Volume 7, No. 23, Pages 7119 to 7517,
November 2 - November 13, 1992

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

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Citation Form: 7 FCC Rcd 1 (1992)

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY, INC. — File Nos. 5/6-DSS-MP/ML-92

Application to combine two single satellites into one hybrid satellite

HUGHES COMMUNICATIONS GALAXY, INC. — File No. 16-DSS-ML-92

Application for interim orbital assignments of Galaxy 6

HUGHES COMMUNICATIONS GALAXY, INC. — File No. 17-DSS-ML-92

Application to use Galaxy 6 as replacement satellite for Galaxy 2

SATELLITE TRANSPONDER LEASING CORPORATION — File No. 18-DSS-ML-92

Application for interim orbital assignment of SBS-4 to 77° W.L.

SATELLITE TRANSPONDER LEASING CORPORATION — File No. 19-DSS-ML-92

Application for interim orbital assignment of SBS-6 to 95° W.L.

ORDER AND AUTHORIZATION

Adopted: October 2, 1992; Released: November 2, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Hughes Communications Galaxy, Inc. (HCG) and its wholly-owned subsidiary, Satellite Transponder Leasing Corporation (STLC), have filed several applications relating to their domestic fixed-satellite systems. HCG/STLC request authority to consolidate two single-band satellites into one hybrid satellite and request authority for various interim and regular orbital assignments. Petitions to deny and comments were filed on the various applications. For the reasons discussed below, we grant HCG authority to operate a hybrid satellite at 95° W.L., grant HCG authority to replace Galaxy 2 with Galaxy 6 at 74° W.L., dismiss HCG's request to locate Galaxy 6 at 103° W.L. on an interim basis, grant STLC authority to locate SBS-4 at 77° W.L. on an interim basis subject to certain conditions, and deny STLC authority to locate SBS-6 at 95° W.L. on an interim basis.

II. BACKGROUND

2. HCG is authorized to operate a 12/14 GHz (Ku-band) satellite at 131° W.L. (Galaxy B-R) and a 4/6 GHz (C-band) satellite at 95° W.L. (Galaxy 3-R). HCG wants to combine these two single-band satellites into a single hybrid satellite at 95° W.L. (Galaxy 3H) to be launched January 1994. Communications Satellite Corporation (Comsat) filed a petition to deny[1] the HCG request because Comsat's subsidiary, Comsat General Corporation (Comsat General), is operating the Ku-band SBS-3 satellite at 95° W.L. Comsat General is authorized to operate SBS-3 at that location until November 1992. Using the Comsat maneuver[2] to extend SBS-3's useful life, Comsat General has requested extended authority to operate SBS-3 at 95° W.L. beyond the date on which HCG seeks to launch Galaxy 3R.[3]

3. HCG's C-band Galaxy 6 satellite is operating at 99° W.L. on an interim basis until Galaxy 4H is launched into 99° W.L. in early 1993. Galaxy 6 does not have a regularly assigned orbital location. Galaxy 2 is operating at 74° W.L. until its end-of-life in December 1993. HCG wants to use Galaxy 6 as the replacement satellite for Galaxy 2 at 74° W.L. instead of launching a new satellite as Galaxy 2's replacement. No party objects to this request. HCG also wants to operate Galaxy 6 at 103° W.L. for an interim period between the time Galaxy 4H replaces it at 99° W.L. in early 1993 and the end-of-life of Galaxy 2 in December 1993. GTE Spacenet Corporation (GTE Spacenet) and GE American Communications, Inc. (GE Americom) filed comments on both applications. GTE Spacenet has no objection to Galaxy 6 being located at 103° W.L. provided that such authority be conditioned on Galaxy 6 not causing any adverse interference into its Spacenet 4 hybrid satellite at 101° W.L. GE Americom argues that Hughes has not justified an interim assignment at 103° W.L. and that any authorization should be conditioned to prevent Hughes from obtaining regular authority at 103° W.L.

4. STLC is operating its Ku-band SBS-4 satellite at its assigned 91° W.L. location. STLC seeks to relocate SBS-4 temporarily at 77° W.L. when the Galaxy 7H satellite (as-

[1] The petition was received after the established comment period.

[2] The Comsat maneuver is a satellite control technique in which a satellite operator ceases north-south stationkeeping of its satellite to conserve fuel and thereby extend the spacecraft's operational life-time.

[3] The SBS-3 satellite is assigned to, and operating at, 95° W.L. in an inclined orbit mode using the Comsat maneuver. Comsat General Corporation, 6 FCC Rcd 3345 (Dom. Fac. Div. 1991). Comsat General has filed a request to extend the operating authority of SBS-3 until December 31, 1995. Application File No. 29-DSS-ML-92. We will dispose of that application in a separate action.

signed to operate at 91° W.L.) is launched in October 1992. STLC seeks to operate SBS-4 at 77° W.L. through the end of SBS-4's useful life in August 1994.[4] No party objects to this proposal.

5. STLC seeks an interim orbital assignment for its Ku-band SBS-6 satellite. SBS-6 is operating at 99° W.L. on a temporary basis, although it is assigned to 72° W.L.[5] STLC wants to relocate SBS-6 to 95° W.L. in February 1993 when Galaxy 4H becomes operational at 99° W.L. STLC wants to operate SBS-6 at 95° W.L. until Galaxy 3H is launched into 95° W.L. in January 1994. Comsat filed a petition to deny the STLC request arguing that it intends to operate SBS-3 at 95° W.L. until 1995.[6] GE Americom filed comments suggesting that if an interim orbital assignment is granted, the older SBS-4 should be used at 95° W.L. instead of the newer SBS-6 so that HCG may not "leverage" regular authority from this grant.

III. DISCUSSION

Galaxy 3H

6. HCG proposes to implement a new Galaxy 3H hybrid satellite at 95° W.L. instead of implementing a Ku-band satellite at 131° W.L. and a C-band satellite at 95° W.L. The proposed technical specifications of Galaxy 3-H are virtually identical to those authorized for the single-band satellites. Grant of this request would essentially entail reassigning HCG's Ku-band space segment from 131° W.L. to 95° W.L. HCG would receive no additional orbital locations. Comsat General is operating SBS-3 at 95° W.L. using the Comsat maneuver. It has applied for authority to continue to use this maneuver to extend SBS-3's useful life beyond its November 1992 license expiration and the proposed launch date of Galaxy 3H. Comsat General asserts that if it is required to cease operations from 95° W.L. before 1995,it will suffer irreparable economic harm.[7]

7. The Bureau has authorized the use of the Comsat maneuver to extend the operational life of older satellites until state-of-the-art satellites authorized to operate from the same locations are ready to be launched.[8] However, those authorizations were not intended to be used to delay the availability of new satellite technology. Thus, authorizations to use the Comsat maneuver to operate a satellite beyond its license term include a condition rendering the authorization subject to cancellation without a hearing should the Commission find it necessary to accommodate more efficient satellites or if, in the opinion of the Commission, circumstances should so require.[9]

8. HCG proposes to consolidate two single-band satellites into a state-of-the-art hybrid satellite that would operate at 95° W.L. Operating a state-of-the-art hybrid satellite rather than two single-band satellites may have certain efficiencies. Construction, launch and insurance costs for one hybrid will be lower than the costs for two single-band satellites.[10] Moreover, hybrid satellites can be designed with technical capabilities equivalent to single-band satellites. Thus, hybrid satellites can provide cost savings to operators and customers with no decrease in technical performance. Consequently, the Commission has attempted, when possible, to assign operators to corresponding C-band and Ku-band orbital locations.[11] We have also reassigned C-band and Ku-band satellites assigned to different locations to facilitate implementation of hybrid satellites.[12]

9. Comsat opposes HCG's proposal because Comsat General wants to continue to operate its SBS-3 satellite at 95° W.L. beyond its November 1992 license expiration and past the launch of Galaxy 3H in January 1994.[13] We find, however, it is not in the public interest to allow an obsolete satellite to continue to operate past its license term and effectively block the entry of a new, more efficient hybrid satellite that may be regularly assigned to that location. New state-of-the-art satellites employ technological advancements that use the spectrum more efficiently and that allow more customers to be served with maximum quality service. SBS-3, for example, does not employ full frequency re-use nor are its transmission powers comparable to the latest generation of satellites being built. Accordingly, we find it is in the public interest to permit HCG to combine its single-band licenses at 95° W.L. and 131° W.L. into one license for a state-of-the-art hybrid satellite at 95° W.L.

10. Further, we do not find that Comsat's desire to operate SBS-3 beyond its license term gives rise to hearing rights or alters the availability of the 95° W.L. orbital location for reassignment. Comsat has not applied for a replacement satellite for SBS-3.[14] Consequently, Comsat has no renewal expectancy[15] at 95° W.L. and the location is available for reassignment at the expiration of SBS-3's license term.[16] Any grant of extended operational authority for SBS-3 would be granted subject to cancellation in its

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[4] Originally, STLC proposed to relocate SBS-4 to 83° W.L. Petitions to deny this proposal were filed by GE Americom, American Telegraph & Telephone (AT&T) and Primestar Partners, L.P. Consequently, STLC decided to propose an alternative interim location for SBS-4 at 77° W.L.

[5] *See* Satellite Transponder Leasing Corporation, 5 FCC Rcd 1651 (Com. Car. Bur. 1990).

[6] *See* para. 2, *supra*.

[7] Comsat also argues that the Commission is obligated to hold a hearing before it can grant HCG's applications pursuant to Section 309 of the Communications Act, 47 U.S.C. § 309 (1991), and Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), because Comsat argues the competing claims to 95° W.L. are mutually exclusive.

[8] *See* Comsat General Corporation, 4 FCC Rcd 3820 (Com. Car. Bur. 1989), at para. 8.

[9] *See, e.g.*, letters from Chief, Domestic Facilities Division, to H. Richard Juhnke (February 26, 1988) (Extension of operating authority and authority to use the Comsat maneuver for Westar 3) and Robert Mansbach (July 26, 1988, February 29, 1988 and September 1, 1987) (Comsat maneuver for SBS-2, Comsat D-2/D-4 and SBS-1, respectively). *See also* GTE Spacenet Corporation, 5 FCC Rcd 1182 (Com. Car. Bur. 1990) (Comsat maneuver for GSTAR III).

[10] *See* Hughes Communications Galaxy, Inc., 5 FCC Rcd 3423 (Com. Car. Bur. 1990)).

[11] *See* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988).

[12] *See* GE American Communications, Inc., 7 FCC Rcd 5169 (Com. Car. Bur. 1992).

[13] Comsat General has stated that the Comsat maneuver can extend a satellite lifetime by five to seven years beyond the normal design life.

[14] Comsat seeks to operate SBS-3 for an additional three years. Satellite operators may file applications for authority to construct and launch satellites up to five years in advance of the planned launch date. Licensing Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (1985), at para. 28.

[15] *1988 Assignment Order*, 3 FCC Rcd 6972, at note 31.

[16] *See, e.g., 1988 Assignment Order*, 3 FCC Rcd 6972, at para. 11

entirety without a hearing, consistent with prior Division action.[17] Thus, contrary to Comsat's claim otherwise, the Commission is not required to conduct a hearing pursuant to *Ashbacker Radio Corp. v. FCC*. In addition, Comsat, in its petition to deny, has failed to make specific allegations of fact sufficient to show that grant of HCG's application would be prima facie inconsistent with the public interest.[18] Even assuming that all of Comsat's allegations are true, grant of HCG's request would not be contrary to the Commission's domestic satellite policies. As stated above, the Commission has recognized the public interest benefits inherent in state-of-the-art hybrid satellites.[19] Moreover, the Commission has recognized the importance of implementing newer generation satellites by including a condition in all license terms extensions that allows the additional operating authority to be cancelled without hearing. Thus, we found above that grant of the Galaxy 3H proposal is consistent with the public interest because it allows the realization of the efficiencies gained by the regular assignment of a state-of-the-art satellite over the temporary assignment of an obsolete satellite operating past the end of its license term.

SBS-6

11. SBS-6 now operates at 99° W.L. on a temporary basis, although it is assigned to 72° W.L. STLC proposes to operate its Ku-band SBS-6 satellite temporarily at 95° W.L. starting in February 1993 when Galaxy 4H becomes operational at 99° W.L. and until Galaxy 3H is successfully launched into 95° W.L. in January 1994. Comsat's Ku-band SBS-3 satellite has been operating at 95° W.L. since its launch in November 1982. Comsat filed a petition to deny STLC's application, stating that it intends to use the Comsat maneuver to keep SBS-3 operational beyond its ten-year license term.[20]

12. As stated above, this Bureau has found that it is in the public interest to allow operators to extend the useful life of older satellites until new state-of-the-art satellites are ready to be launched. This allows the operator of the older satellite to serve customers and to receive a return on its investment for as long as possible while not impeding the availability of new technologies and services.[21] In this order, HCG is authorized to implement a new state-of-the-art satellite at 95° W.L. in early 1994, when Galaxy 3H is launched. STLC's request to locate SBS-6 at 95° W.L. on a temporary basis beginning in February 1993 would effectively require the decommissioning of SBS-3 one year before Galaxy 3H is operational. We will not permit HCG to "bootstrap" itself into an earlier stake in the 95° W.L. orbital location by giving it a regular assignment beginning in 1994. While SBS-6 may be technically superior to the older SBS-3 satellite, SBS-6 is not assigned to 95° W.L. Rather, it is assigned to 72° W.L., where it may begin providing service immediately. We do not believe that any public interest benefits to be gained from permitting HCG to occupy 95° W.L. for eleven months would outweigh the costs to Comsat and its customers in requiring SBS-3 to vacate 95° W.L. eleven months before it would otherwise be necessary. Therefore, until Galaxy 3H is launched in January 1994, we see no reason for SBS-3 to be decommissioned or moved.[22]

Galaxy 6

13. HCG proposes to operate Galaxy 6 at 103° W.L. for an interim period between the time Galaxy 4H replaces it at 99° W.L. in early 1993 and the end-of-life of Galaxy 2 in December 1993. HCG then requests authority to move Galaxy 6 into Galaxy 2's 74° W.L. location, where it will serve as Galaxy 2's replacement.

14. The 103° W.L. location is within that portion of the orbital arc that is included in a Canadian, Mexican and United States trilateral arrangement reached in 1988.[23] Under the provisions of the arrangement, Canada is permitted to occupy the 104.5° W.L. location with a C-band satellite until the 1994 time frame, when GTE Spacenet launches a hybrid satellite into 103° W.L. Thus, we will not approve the interim C-band assignment of 103° W.L. to Galaxy 6 without the express consent of the Canadian administration. This consent is found nowhere in the record. Moreover, we will not initiate renegotiations of the trilateral arrangement absent compelling public interest reasons to do so. HCG's desire to provide service from 103° W.L. for less than one year does not warrant reopening the complex negotiations that preceded the signing of the 1988 arrangement. Therefore, we dismiss without prejudice the HCG application requesting an interim orbital assignment for Galaxy 6 of 103° W.L.

15. No party opposes HCG's proposal to replace Galaxy 2 with Galaxy 6 at 74° W.L. and therefore, we grant the application. In the interim period between the time Galaxy 4H replaces Galaxy 6 at 99° W.L. and the end-of-life of Galaxy 2, HCG must co-locate Galaxy 6 with another one of its C-band satellites.[24]

SBS-4

16. STLC proposes to operate its Ku-band SBS-4 satellite at 77° W.L. through the end of its life in August 1994. SBS-4 has been operating at 91° W.L. since its launch in 1984. It will be replaced in the next few months, however, with Galaxy 7-H. STLC's request to move SBS-4 to 77° W.L. upon Galaxy 7-H's launch is unopposed. The 77° W.L. location, however, has not been coordinated internationally. Accordingly, while we grant STLC's request for

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(76° W.L. reassigned from Safecom Partnership to National Exchange Satellite, Inc. after expiration of Safecom Partnership's licenses) and 5 FCC Rcd 179, para. 26 (85° W.L. reassigned from American Telephone & Telegraph Company (AT&T) to Hughes Communications Galaxy, Inc. after expiration of AT&T's license).

[17] *See* note 9, *supra*.

[18] *See* Astroline Communications Company Limited Partnership v. FCC, 857 F.2d 1556, 1561 (D.C. Cir. 1988); Arnold L. Chase, 5 FCC Rcd 1642, 1644 (1990).

[19] *See* para. 8, *supra*.

[20] Comsat also reiterates its claim that a hearing is necessary before STLC's request can be granted. *See* discussion at paras. 6-10, *supra*.

[21] *See* para. 7, *supra*.

[22] GE Americom's arguments regarding STLC's ability to leverage regular authority to operate at this location from an interim authorization are rendered moot by this decision.

[23] *See* letter from Chief, Common Carrier Bureau, FCC to Senior Assistant Deputy Minister, Government of Canada Department of Communications (August 19, 1988).

[24] For example, HCG could co-locate Galaxy 6 with Galaxy 2 at 74° W.L. Also, because HCG's Galaxy 2-R will not be built, we render the authorization for Galaxy 2-R, Hughes Communications Galaxy, Inc., 3 FCC Rcd 6989 (1988), null and void.

reassignment, we will permit operation of SBS-4 at 77^0 W.L. on a non-interference basis only until such time as coordination is completed.[25]

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that Application File Nos. 5 & 6-DSS-MP/ML-92 ARE GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to consolidate its Ku-band Galaxy B-R satellite at 131^0 W.L. and its C-band Galaxy 3-R satellite at 95^0 W.L. into the hybrid Galaxy 3-H at 95^0 W.L. as proposed in its application.

18. IT IS FURTHER ORDERED that the Ku-band portion of the 131^0 W.L. orbital location is available for reassignment.

19. IT IS FURTHER ORDERED that Application File No. 16-DSS-ML-92 requesting authority to locate Galaxy 6 at 103^0 W.L. temporarily IS DISMISSED WITHOUT PREJUDICE.

20. IT IS FURTHER ORDERED that Application File No. 17-DSS-ML-92 IS GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to use Galaxy 6 to replace Galaxy 2 at 74^0 W.L. at the end of Galaxy 2's useful life.

21. IT IS FURTHER ORDERED that the authorization for Galaxy 2-R, Hughes Communications Galaxy, Inc., 3 FCC Rcd 6989 (1988), is NULL and VOID.

22. IT IS FURTHER ORDERED that Application File No. 18-DSS-ML-92 IS CONDITIONALLY GRANTED and Satellite Transponder Leasing Corporation IS AUTHORIZED to operate SBS-4 at 77^0 W.L. on a non-interference basis until international coordination is completed. The period of operation shall start when Galaxy 6H is launched and terminate at the expiration of SBS-4's license term.

23. IT IS FURTHER ORDERED that Application File No. 19-DSS-ML-92 requesting an interim orbital assignment of SBS-6 to 95^0 W.L. IS DENIED.

24. IT IS FURTHER ORDERED that the Petition to Deny filed by Communications Satellite Corporation IS DENIED as it pertains to the grant of Application File Nos. 5/6-DSS-ML-92 and IS GRANTED as it pertains to the denial of Application File No. 19-DSS-ML-92.

25. IT IS FURTHER ORDERED that this Order and Authorization will be effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[25] *See* Section 25.111(b) of the Commission's rules, 47 C.F.R. § 25.111(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 22, 1992

Released: October 30, 1992

Dr. Frederick Breitenfeld, Jr. 8210-AJZ
President 92060835
WHYY, Inc.
Licensee, Noncommercial
Television Station WHYY-TV
150 North 6th Street
Philadelphia, Pennsylvania 19801

Dear Dr. Breitenfeld:

This is in reference to the Commission's investigation into a complaint by the Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus, Inc., that in October 1991, station WHYY-TV aired an underwriting announcement for Vee Corp.'s "Sesame Street Live" show at the end of WHYY-TV's "Sesame Street" program that may have violated Section 399B of the Communications Act of 1934, as amended, as well as the Commission's host-selling policy. On May 18, 1992, we requested a tape of that underwriting announcement, as well as your comments on the complaint. You responded with a tape, contending that the announcement does not constitute a promotional announcement, as it contains no reference to price, no call to action, no inducement to buy, and no comparative or qualitative language, but furnishes only the date and location of the performances and location of ticket outlets. Nor do you believe that the announcement constituted host-selling, as it did not include product pitching by program characters. You also explain that you attempted to negotiate with CARU, but refused to make a commitment not to air the announcement which you believe contained lawful material.

Upon review of the tape, we believe that the "Sesame Street Live" underwriting announcement violates the Commission's host-selling policy. The announcement, which is 15 seconds long, features various "Sesame Street" characters dancing on a stage, turning over letters of the alphabet, as they apparently appear in the "Sesame Street Live" performance, as well as a still photo of the Spectrum logo at the end. The audio, accompanied by a musical background, consists of the following:

> Sesame Street Live joins you in making possible this broadcast on TV 12. Sesame Street Live will be at the Spectrum October 23rd through the 27th. Tickets are available at the Spectrum and Ticketmaster outlets.

The Commission's prohibition of host-selling applies to the use of program characters to promote products. *Children's Television Report and Policy Statement*, 50 FCC 2d 1 (1974), and extends to noncommercial as well as commercial stations. *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations ("1986 Public Notice")*, FCC 86-161, released April 11, 1986, at p. 6. We have applied this prohibition in a number of instances. *See Letter to KTVU, Inc.*, (MMB) released July 21, 1989 (admonition for airing "GI Joe" spots during "GI Joe" children's series); *Letter to Television Station WGNO*, (MMB) released February 8, 1990 (admonition for airing "Teenage Mutant Ninja Turtles" toys spot during "Teenage Mutant Ninja Turtles" children's series); *Letter to KCOP Television, Inc.*, (MMB) released May 15, 1989 (admonition for airing "My Little Pony" spots during "My Little Pony" children's series).

In *KCOP*, we established that advertisements featuring the same type of animation that is regularly featured in the accompanying program constitutes host-selling. Here, the "Sesame Street Live" underwriting announcement (albeit not a commercial advertisement) features the same Sesame Street characters that appear in the Sesame Street program in a manner that is suggestive of endorsement. In 1985, the Commission advised broadcasters to eliminate program hosts, personalities, or characters from commenting on products, *or in any manner suggesting endorsement.Action for Children's Television v. KTTV*, 58 RR 2d 61, 65 (1985), *reversed on other grounds, National Association for Better Broadcasting v. FCC*, 830 F.2d 270 (D.C. Cir. 1987)(emphasis added). Although you assert that the characters did not pitch any products, the highlight of their "Live" performance in the underwriting announcement appears to entice the program's child viewership to attend the show. Thus, host-selling encompasses any character endorsement -- not just direct vocal appeals -- that has the effect of confusing a child viewer from distinguishing between program and non-program material.

Therefore, we hereby admonish WHYY-TV for its violation of the Commission's host selling policy. This letter will be made part of WHYY-TV's permanent record.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Liggett Broadcast, Inc.
(Assignor)

and File No. BALH-920521HM

Harry J. Pappas
(Assignee)

For Assignment of Licenses
of Station KCML(FM)
Hanford, California

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 1992; Released: November 3, 1992

By the Commission:

1. The Commission has before it the above-captioned application which seeks Commission consent to the assignment of the license of Station KCML(FM), Hanford, California, from Liggett Broadcast, Inc. (Liggett) to Harry J. Pappas (Pappas). The application is unopposed.

2. Pappas and his wife Stella A. Pappas jointly own ninety-nine percent of the stock of Pappas Telecasting Incorporated, the licensee of UHF television station KMPH(TV) (Channel 26, Fox), Visalia, California. The acquisition of Station KCML(FM) by Pappas will result in a television/radio combination where the Grade A contour of the television station encompasses the city of license of the radio station. In addition, the 1 mv/m contour of KCML(FM) encompasses Visalia, California. Such television/radio combinations are generally proscribed by Section 73.3555(b) of the Commission's rules (the one-to-a market rule). Pappas requests a waiver of the rule.

3. Note 7 to §73.3555(b) states that the Commission will entertain requests to waive the restrictions of the one-to-a-market rule on a case by case basis, and will look favorably upon waiver applications that meet either of two standards: (a) waiver requests involving stations in the top 25 markets, where 30 or more separately owned, operated, and controlled broadcast voices would remain after the proposed assignment or (b) waiver requests involving "failed" broadcast stations. The note defines a "failed" broadcast station as one that has not been operated for a substantial period of time, *e.g.*, four months, or that is involved in bankruptcy proceedings. Other waiver requests, pursuant to Note 7, are to be evaluated on a more rigorous case-by-case basis, as set forth in the *Second Report and Order* in MM Docket No. 87-7. *See Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1741 (1989), *recon. denied in part and granted in part*, 4 FCC Rcd 6489 (1989). Under that standard, the Commission will determine if the proposed combination serves the public interest based upon an evaluation and balancing of other specific factors, including the types of facilities involved, the number of stations already owned by the applicant, the potential benefits of the combination, the financial difficulties of the station, and the nature of the market in light of our diversity and competition concerns. In looking at these various factors, the Commission evaluates whether the potential benefits of combined facilities can be obtained without undermining the public interest goals of diversity and economic competition in the local communications markets. *Id.* at 1753.

WAIVER REQUEST

4. The subject situation does not fall within the top 25 market/30 independent voice standard or the failed station standard. Accordingly, Pappas requests waiver based on the case-by-case standard.

5. *Types of Facilities/Other Broadcast Interests.* With respect to the type of facilities, KMPH(TV) is a UHF station operating on Channel 26. It is authorized to operate at 2950 kw visual, 295 kw aural at an antenna height of 832 m. HAAT.[1] KCML(FM) is a Class B facility operating with 20.5 kw power at 239 m. HAAT. Pappas has no other broadcast interests in the market.

6. *Public Interest Benefits.* According to Pappas, the most important public interest benefit of the combination is that Pappas will keep KCML(FM) from going dark. As is discussed below, KCML(FM) has a history of financial difficulties. Pappas states that he "is committed to operating the station in the public interest and is willing to provide the funds necessary to keep the station on the air." Pappas also proposes to improve KCML(FM)'s public interest programming and reintroduce local news programming on the FM station. KCML(FM) does not currently broadcast any news nor does it have a news wire. KMPH(TV), on the other hand, has a twenty-person news staff and covers events and issues of Hanford and the other communities within the market. Upon consummation of the proposed assignment, Pappas represents that KCML(FM) will be able to make use of these resources to provide news and public affairs programming responsive to its community. Furthermore, Pappas asserts that joint operation of KCML(FM) and KMPH(TV) will result in approximately $210,000 in savings per year. First, combining rent, utilities, telephone and maintenance will save at least $25,000 per year. Joint operation and consolidation of functions would also save $30,000 in accounting and management expenses; $30,000 in engineering costs; $25,000 in news costs; $15,000 in sales support expenses; and $75,000 in costs incident to sales promotions and spot productions. Lastly, sharing common equipment and the KMPH(TV) computer will save another $10,000 per year.

7. *Financial Difficulties.* As noted above, KCML(FM) has a history of financial difficulties. Each year, since 1987, the station has suffered a substantial loss. In 1987, the loss before income taxes was $1,324,659. In 1991, the loss before income taxes was $777,706. Even in its "best" year in recent history, 1989, the station lost $634,938. During the

[1] Pappas holds a construction permit for change to 3311kw max. visual, 335kw max. aural, 767 m. HAAT (BMPCT-830927KF).

first four months of 1992, KCML(FM) lost $112,719. The total loss since 1987 exceeds $4.2 million. Over the past five years, broadcast revenues have steadily declined from $1,175,507 in 1987 to $222,901 in 1991. During the first four months of 1992, the station's total broadcast revenues were $36,540. Liggett argues that if KCML(FM) were a "stand-alone" and not part of a group, it would have been in bankruptcy by now. It concludes that KCML(FM) has "failed", and absent a sale of the station, "its only reasonable choice will be to go dark, resulting in a loss of service to the public."

8. *Efforts to Sell KCML(FM).* Liggett details its unsuccessful efforts to find another buyer for KCML(FM). In 1988, Liggett retained three brokers to sell the station, but no serious inquiries developed. Between January and April, 1989, Liggett negotiated unsuccessfully with a potential purchaser. At that time, the asking price was four million dollars. In April 1989, another broker was contacted. In November 1989, Liggett entered into negotiations with another potential buyer. While letters of intent were signed, the potential buyer subsequently decided not to go forward with the transaction "despite Mr. Liggett's attempts to keep the deal alive." In April 1990, Liggett reached a memorandum agreement with two individuals at a price of two million dollars, but after considerable delay the prospective buyers' financing source turned them down. In May 1990, discussions with another buyer were unsuccessful. From October to December 1990, Liggett negotiated with yet another buyer, at a price of $1.1 million, but the buyer purchased another station. From August through December 1991, Liggett negotiated with a prospective purchaser, at a price of $850,000. However, the buyer was unable to finance the purchase. Liggett also had unsuccessful discussions with another party who would also need a waiver of the one-to-a-market rule. Finally, Liggett was able to enter into an agreement with Pappas, for a price of $550,000. Liggett concludes that it "has exhausted all of the realistic possibilities for a sale of KCML(FM), and Mr. Pappas is the only available purchaser in the near term." Accordingly, Liggett states "given the current financial plight of the station, a sale of KCML(FM) to Mr. Pappas represents the only avenue to ensure the station's survival."

9. *The Market.* Pappas contends that, even after consummation of the proposed assignment, the market would contain a diverse array of media outlets. Hanford is located in the Fresno-Visalia, California market, which is the 59th ranked television market. Using Arbitron data (*Winter 1992* survey), Pappas shows that there are 27 rated commercial radio stations in the radio market. Pappas states that there are six co-owned pairs of AM/FM stations within this group, leaving 21 separate commercial radio voices. In addition, there are four operating non-commercial educational FM stations licensed to Fresno and one licensed to Visalia. Thus, based on the *Winter 1992* Arbitron survey, the total number of separate radio voices in the market is 26. Additionally, there are nine operating television stations in the ADI (three network, four independent, two non-commercial educational), all of which are owned separately from each other and from the radio stations in the market.[2] Thus, using *Winter 1992* Arbitron data, Pappas shows that there are 35 separate radio and television voices in the market. Cable penetration in the market is 51%. In addition, there are seven daily and 13 weekly newspapers published in the Fresno-Visalia market.

DISCUSSION

10. In amending the one-to-a-market rule, the Commission emphasized that the new waiver policy was not an abandonment of its continuing concerns for encouraging diversity of voices and economic competition. *Second Report and Order*, 4 FCC Rcd at 1752. Thus in evaluating requests for waiver of the one-to-a-market rule, "our goal in all situations is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market area involved." *Amendment of Section 73.3555 (partial reconsideration)*, 4 FCC Rcd at 6491. In acting upon requests where stations are not in the top 25 television markets or fewer than 30 separate "voices" would remain after the acquisition, or where no claim of a "failed station" is availing, the Commission has indicated that applicants must specifically demonstrate the public interest benefits of common ownership.

11. We find that the requested waiver meets the public interest case-by-case criteria and will result in significant public service benefits without a substantial adverse impact on the level of diversity and competition in the Fresno-Visalia market. *See e.g. Ramar Communications, Inc.*, 7 FCC Rcd 3310 (1992). While the FM and TV station facilities are not insubstantial, Pappas has no other media interests in the market. This is not the type of combination that the Commission has declined to approve in the past. *Compare Kargo Broadcasting, Inc.*, 5 FCC Rcd 3442 (1990) (Commission denied assignment to applicant who already owned a substantial number of powerful media outlets in the market). Furthermore, the combination will result in cost savings and economic efficiencies of approximately $210,000 and the reinauguration of local radio news and public interest programming by KCML(FM). Most importantly, in view of the station losses and its economic condition, Pappas's ownership will prevent KCML(FM) from going dark. *See Tulsa 23*, 5 FCC Rcd 727 (1990) (Commission accords "substantial weight" in one-to-a-market waiver situation where documented financial difficulties threaten station viability). In addition, Liggett adequately demonstrated that it attempted in good faith to find a buyer for KCML(FM) who would not require a waiver of the one-to-a-market rule.

12. With respect to the media in the market, while Pappas uses the Arbitron *Winter 1992* survey as the basis for its market data, Note 7 of Section 73.3555(b) requires that the Commission determine the number of radio stations in a market as detailed in the "television metropolitan market" published in the latest *Arbitron Ratings Television ADI Market Guide* (Guide). The latest Guide (1990-91) indicates that the Fresno-Visalia "television metropolitan market" includes *only* Fresno County. The Guide does not include Kings County, where KCML(FM) is licensed, in the "television metro market." Fresno County has 18 commercial radio stations and four noncommer-

[2] Three additional television stations are authorized, but not yet constructed, and six licensed low power television stations and television translators operate in the market. Construction permits for an additional seven LPTV stations have also been granted.

cial educational radio stations licensed to it. Nineteen of these radio stations are separately owned. Thus, using the requirements of Section 73.3555(b), the "market" has 28 separate radio and television voices (19 separately owned radio stations in Fresno county plus the 9 separately owned television stations in the ADI) - consisting a significant number of separate voices.[3] *Compare Kyles Broadcasting, Ltd.*, 5 FCC Rcd 5846 (1990) (Waiver granted in Memphis, Tennessee, with 29 separate voices, 50% cable penetration and three daily newspapers). Thus, we find that the Fresno-Visalia area has abundant broadcast and nonbroadcast diversity and competition, which will not be significantly affected by grant of the requested waiver.

13. We further find that the applicants are fully qualified and that a grant of the application will serve the public interest, convenience and necessity. Accordingly, the request for waiver of the Commission's one-to-a-market rule, Section 73.3555(b), and the application (BALH-920521HM) to assign Station KCML(FM) from Liggett Broadcast Inc. to Harry J. Pappas ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[3] Further, the inclusion of Kings County, where KCML(FM) is licensed, would add two more separate voices to the count of separate media voices. *Compare United Radio Group, Inc.*, 7 FCC Rcd 2207 (1992) (Commission included stations in the "home" county in the analysis of separate media voices).

Before the
Federal Communications Commission
Washington, D.C. 20554

GTE MOBILNET OF TERRE HAUTE LIMITED PARTNERSHIP File No. 06667-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 185 Terre Haute, Indiana

DULUTH MSA LIMITED PARTNERSHIP File No. 06754-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 141 Duluth, Minnesota-Wisconsin

TOLEDO CELLULAR TELEPHONE COMPANY File No. 06726-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 48, Toledo, Ohio-Michigan

SACO RIVER CELLULAR TELEPHONE COMPANY File No. 05635-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 156 Portsmouth-Dover-Rochester, New Hampshire

NATIONAL CELLULAR COMMUNICATIONS, INC. File No. 05468-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommuniations Service on Frequency Block A in Market No. 131 Rockford, Illinois

INDEPENDENT CELLULAR NETWORK, INC. File No. 06065-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 110 Huntington-Ashland, West Virginia-Kentucky-Ohio

ALBANY TELEPHONE COMPANY File No. 06014-CL-MP-92; 05851-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 44 Albany-Schenectady-Troy, New York

ALLTEL MOBILE COMMUNICATIONS OF FLORIDA, For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 245 Ocala, Florida File No. 06428-CL-MP-92

BROWNSVILLE CELLULAR TELEPHONE COMPANY, For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 162 Brownsville-Harlingen, Texas File No. 06042-CL-MP-92

MEMPHIS CELLULAR TELEPHONE COMPANY File No. 06369-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 36 Memphis, Tennessee-Arkansas-Mississippi

FAYETTEVILLE MSA LIMITED PARTNERSHIP File No. 06070-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 182 Fayetteville-Springdale, Arkansas

MCALLEN-EDINBURGH-MISSION SMSA LIMITED PARTNERSHIP File No. 06332-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 162 Brownsville-Harlingen, Texas

INDEPENDENT CELLULAR NETWORK, INC. File No. 06625-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 143 Johnstown, Pennsylvania

METROPLEX TELEPHONE COMPANY — File No. 06629-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 9 Dallas, Texas

MCCAW COMMUNICATIONS, FT. PIERCE, INC. — File No. 06489-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 208 Fort Pierce, Florida

MOBILE MSA LIMITED PARTNERSHIP — File No. 06544-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 83 Mobile, Alabama

INTERSTATE MOBILEPHONE COMPANY — File No. 06499-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 82 Tacoma, Washington

UTICA TELEPHONE COMPANY — File No. 06569-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 115 Utica-Rome, New York

MEMORANDUM OPINION AND ORDER

Adopted: October 26, 1992; Released: November 3, 1992

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. The Committee for Effective Cellular Rules (Committee) has filed petitions to dismiss, deny, or defer the captioned applications to modify existing cellular systems. We are consolidating the petitions filed by Committee because they raise similar issues. For the reasons discussed below, we deny all of them.

II. DISCUSSION

2. Committee first argues that it has standing to file its petitions. It claims that: (i) grant of the captioned applications would prejudice certain positions it has taken in its petitions for reconsideration of the unserved areas rulemaking proceedings[1] (ii) its members have a cognizable interest in filing applications for unserved areas which allegedly would suffer injury in fact were the captioned applications granted; and (iii) it is a representative of the "public interest." It is well settled that a petitioner must be a "party in interest" in order to have standing. *See* Section 22.30 of the Commission's Rules and Section 309(d)(1) of the Communications Act of 1934 (the Act). Therefore, we find that Committee's involvement in the unserved areas rulemaking proceeding does not of itself vest it with standing in this proceeding. Indeed, the Commission has held that participation as a party in a rulemaking proceeding does not generally confer standing in an application proceeding. *See Public Broadcasting Service*, 96 FCC 2d 555 (1984).

3. In support of Committee's claim that its membership would be foreclosed from applying for "unserved areas" were the captioned applications to be granted, it submits the affidavit of one of its members which states that, "it is my present intention to file unserved-area cellular applications for selected markets . . . ." Petition to Deny, Attachment A, *Declaration of Charles L. Beckett* (*Beckett Declaration*). The Common Carrier Bureau (Bureau) has accorded standing to an association only if one of its members can show standing independently. *Nancy Naleskiewicz*, 5 FCC Rcd 7131 (Com. Car. Bur. 1990); *citing Petitions to Deny*, 82 FCC 2d 89, 96 (1980).[2] The interest cited in the *Beckett Declaration* is speculative and does not represent a cognizable interest in a filed application.[3] *See Jonathan Stewart*, DA 92-895 (Mobile Serv. Div. 1992); *Metromedia Company*, DA 92-59 (Mobile Serv. Div. 1992). Committee

[1] Committee has filed petitions for reconsideration of the following proceedings: *Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, First Report and Order and Memorandum Opinion on Reconsideration*, 6 FCC Rcd 6185 (1991) (*First Report and Order*); *Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, Second Report and Order*, 7 FCC Rcd 2449 (1992) (*Second Report and Order*).

[2] Committee cites *Corpus Christi Cellular Telephone Co.*, 3 FCC Rcd 1889 (Mobile Serv. Div. 1988), for the proposition that an association has standing when the petition is supported by affidavits of allegedly interested parties. However, the *Corpus Christi* decision indicated that an affidavit is only one of the factors "*inter alia*" in determining standing. Furthermore, the petitioners in *Corpus Christi* were denied standing on the basis of the lack of an affidavit. *Id.* at 1889.

[3] Committee also contends, in some of its petitions, that because the captioned modifications propose unlawful post fill-in expansions of Cellular Geographic Service Area (CGSA), its members will suffer injury as "potential unserved-area applicants." A mere "potential" to be an applicant does not establish standing.

has therefore failed to show that a grant of the captioned applications would "result in, or be reasonably likely to result in, some injury of a direct, tangible, or substantial nature." *Teleprompter*, 87 FCC 2d 531, 537 (1981).

4. We also reject Committee's contention that it has standing as a representative of the "public interest," its third standing claim. Committee describes itself as an "*ad hoc* organization of cellular permittees/licensees, engineering firms, investment bankers, and industry consultants." It further argues that, because the Commission deferred the filing date for unserved areas systems information updates (SIUs) pending the resolution of Committee's petitions for reconsideration in that proceeding, it is the "representative of the public interest." The case Committee cites in support of this argument, *National Broadcasting Company v. F.C.C.*, 362 F.2d 936 (1966) (*NBC*), is inapposite. The court in *NBC* held that "representatives of the public interest" have standing in license renewal proceedings. *Id.* at 954. However, *NBC* relied on a narrow holding in *Office of Communication of the United Church of Christ v. F.C.C.*, 359 F.2d 994, 1005 (1966) (*Church of Christ*), where the court granted standing to a group of petitioners who were non-licensees, holding that "some 'audience participation' must be allowed in license renewal proceedings." 359 F.2d at 1005. Committee consists of a *soi disant* group of cellular industry members who provide cellular service, whereas in *NBC* and *Church of Christ* the petitioners were aggrieved users of broadcast service. Accordingly, Committee does not fall within the "audience participation" rubric of public interest representatives entitled to standing, and we conclude that it does not have public interest standing here. However, despite Committee's lack of standing, we will address its contentions as an informal request, pursuant to Section 1.41 of the Rules.[4]

5. Substantively, Committee levies identical arguments in all its petitions against the subject applications. It argues that the captioned applications, each of which seeks authorization for a new cell near the market border, are premature and unlawful applications for unserved areas. This argument is patently without merit. While it is correct under the unserved areas rules that an applicant may not expand its Cellular Geographic Service Area (CGSA) after its five-year fill-in period has lapsed, all of the captioned applications were filed before the unserved area rules that Committee has cited became effective. The *First Report and Order* in the unserved areas rulemaking held that an unserved area is any area "where there is no CGSA." 6 FCC Rcd at 6200 (footnote omitted). In the *Second Report and Order*, the Commission adopted the new CGSA definition based on a 32 dBu contour standard. This standard did not become effective until July 16, 1992, which was 90 days after the *Second Report and Order* appeared in the Federal Register. Because all of the captioned applications were filed prior to July 16, 1992, the definition of CGSA as it existed prior to the *Second Report and Order* applies. Prior to July 16, 1992, each one of the captioned licensees had defined its CGSA as coterminous with its market boundary. Accordingly, each of the captioned applications legitimately seeks area within its CGSA, not an unserved area.[5] Therefore, we reject Committee's contention that the captioned applications are premature unserved area applications.[6]

6. Finally, Committee also argues that grant of the instant applications would be arbitrary and capricious because the Commission has not articulated a *de minimis* standard for the new 32 dBu contour formula. Here again Committee attempts to apply new rules retroactively. The 32 dBu standard was set forth in the *Second Report and Order* and became effective on July 16, 1992. *See supra*. The instant applications were filed prior to July 16, 1992, and are subject to analysis under the 39 dBu standard.[7] We accordingly reject Committee's contention regarding 32 dBu *de minimis* extensions. For these reasons, we find Committee's arguments to be wholly without merit.

III. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED THAT the Petitions to Dismiss, Deny, or Defer filed by the Committee for Effective Cellular Rules ARE DENIED.

8. IT IS ALSO ORDERED THAT the applications of GTE Mobilnet of Terre Haute General Partnership (File No. 06667-CL-MP-92); Duluth MSA Limited Partnership (File No. 06754-CL-MP-92); Toledo Cellular Telephone Company (File No. 06726-CL-MP-92); Saco River Cellular Telephone Company (File No. 05635-CL-MP-92); National

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[4] *See infra*, n.6.

[5] Committee also contends that the captioned applications seek extensions of their CGSAs into adjacent unserved areas, and not only extensions of their contours. We disagree. It is well established that *de minimis* extensions do not become part of the licensee's CGSA, are not entitled to interference protection, and must be pulled back if they cause objectionable interference to adjacent licensees. Committee's contention in this regard is without merit. It is equally unavailing that, in its reply pleadings, Committee has cited former Section 22.903(d) of the Rules which provides that:

> An applicant whose proposal would extend its 39 dBu contour . . . outside of its presently authorized CGSA will be deemed to be applying for a change in its CGSA.

This rule has no effect on the captioned applications because they all propose contours within the licensees' existing CGSAs, and the *de minimis* extensions, by definition, are not part of the licensees' CGSAs.

[6] We find the argument proffered by Committee to be so patently inimical to the plain reading of the law that it casts into doubt the petitioner's *bona fides*. To this extent, we caution Committee and its counsel, and any others, that if they should file similarly meritless petitions in the future, we are prepared to invoke abuse of process remedies. The Commission simply does not have the resources to respond to massive pleadings that advance obviously frivolous positions.

[7] We note that, even if the 32 dBu standard did apply to the captioned applications, the Commission has already stated that:

> "[c]ase law guidelines for service area boundary *de minimis* extensions will be applied as adjusted for the new [32 dBu] formula, [and] new service area boundary extensions created solely by this change are considered *de minimis* and are hereby authorized." *Second Report and Order*, 7 FCC Rcd at 2456, n.35.

Cellular Communications, Inc. (File No. 05468-CL-MP-92); Independent Cellular Network, Inc. (File No. 06065-CL-MP-92); Albany Telephone Company (File Nos. 06014-CL-MP-92; 05851-CL-MP-92); ALLTEL Mobile Communications of Florida (File No. 06428-CL-MP-92); Brownsville Cellular Telephone Company (File No. 06042-CL-MP-92); Memphis Cellular Telephone Company (File No. 06369-CL-MP-92); Fayetteville MSA Limited Partnership (File No. 06070-CL-MP-92); McAllen-Edinburgh-Mission SMSA Limited Partnership (File No. 06332-CL-MP-92); Independent Cellular Network, Inc. (File No. 06625-CL-MP-92); Metroplex Telephone Company (File No. 06629-CL-MP-92); McCaw Communications, Fort Pierce, Inc. (File No. 06489-CL-MP-92); Mobile MSA Limited Partnership (File No. 06544-CL-MP-92); Interstate Mobilephone Company (File No. 06499-CL-MP-92); and Utica Telephone Company (File No. 06569-CL-MP-92) ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-92-215

Application for authority to acquire and operate facilities for service between the U.S. and Congo, Guinea and Swaziland.

Application for authority to acquire and operate facilities for service between the U.S. and Botswana, Cape Verde and Niger. File No. I-T-C-92-216

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 23, 1992; Released: November 3, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Congo, Guinea, Swaziland, Botswana, Cape Verde and Niger by MCI Telecommunications Corporation (MCI).[1]

2. Accordingly, IT IS ORDERED that application File Nos. I-T-C-92-215 and I-T-C-92-216 ARE GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 24 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations in Congo, Guinea and Swaziland furnished by MCI's correspondents;

b. lease from AT&T and operate 24 voice-grade circuits in the Etam earth station to be used in conjunction with the satellite space segment capacity;

c. lease and operate 24 voice-grade connecting circuits between the Etam earth station and MCI's West Orange, New Jersey Center; and

d. use the facilities in a, b and c above to provide MCI's regularly authorized services between the U.S. and Congo (six voice circuits), Guinea (12 voice circuits) and Swaziland (six voice circuits);

e. lease from Comsat and operate 22 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations in Botswana, Cape Verde and Niger furnished by MCI's correspondents;

f. own and operate 22 voice-grade circuits in the Andover earth station to be used in conjunction with the satellite space segment capacity;

g. own and operate 22 voice-grade connecting circuits between the Andover earth station and MCI's West Orange, New Jersey operating center; and

h. use the facilities in e, f and g above to provide MCI's regularly authorized services between the U.S. and Botswana (eight circuits), Cape Verde (eight circuits), and Niger (six circuits).

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines is limited to the provision of such private lines only between the United States and Congo, Guinea, Swaziland, Botswana, Cape Verde and Niger -- that is, private lines which originate in the United States and terminate in Congo, Guinea, Swaziland, Botswana, Cape Verde and Niger respectively or which originate in Congo, Guinea, Swaziland, Botswana, Cape Verde and Niger and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that its correspondents afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

[1] In its applications MCI requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Congo, Guinea, Swaziland, Botswana, Cape Verde and Niger and points beyond. We note that should MCI obtain any interest in facilities beyond those points for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for MCI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

5. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

6. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of their execution.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-92-221

Application for authority
to acquire and operate
facilities for service
between the U.S. and Macao.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 23, 1992, Released: November 3, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Macao[1] by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-221 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 16 voice-grade satellite circuits between the Yacolt, Washington earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Macao furnished by MCI's correspondent in Macao;

b. own and operate 16 voice-grade circuits in the Yacolt earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate 16 voice-grade connecting circuits between the Yacolt earth station and MCI's Dominguez Hills, California operating center; and

d. use said facilities to provide MCI's regularly authorized services between the U.S. and Macao.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Macao, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines is limited to the provision of such private lines only between the United States and Macao -- that is, private lines which originate in the United States and terminate in Macao or which originate in Macao and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Macao end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Macao affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending*.

6. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

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[1] In its application MCI requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Macao and points beyond. We note that should MCI obtain any interest in facilities beyond Macao for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for MCI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T's Private Payphone Commission Plan — File No. ENF-87-19

MEMORANDUM OPINION AND ORDER

Adopted: September 21, 1992; Released: November 4, 1992

By the Commission:

I. INTRODUCTION

1. On October 3, 1988, the Common Carrier Bureau released a Memorandum Opinion and Order in the above-captioned proceeding granting in part and denying in part a petition filed by International Telecharge Inc. (ITI) requesting the Commission to declare the private payphone commission plan (Plan) of American Telephone and Telegraph Company (AT&T) to be unlawful.[1] *AT&T Private Payphone Commission Plan*, 3 FCC Rcd 5834 (Com. Car. Bur. 1988) (*PPCP Order*). ITI has filed a petition for reconsideration[2] and AT&T has filed an application for review. For the reasons set forth below, we deny both the petition for reconsideration and the application for review.

II. BACKGROUND

2. In the *PPCP Order*, the Bureau held that AT&T may properly pay commissions to private payphone companies (PPCs) to compensate them for their costs in making operator services available to end users. The Bureau concluded that the commissions paid under AT&T's plan, which are measured by the "0+" revenue generated by the particular payphone, are legitimate business expenses paid to a PPC to gain a point of service to the end user. The Bureau determined that commissions are not rebates because they are not paid to the end user, that is, the customer, of the "0+" service, but rather, to the PPCs. The Bureau found that the PPC is a customer of AT&T's "1+" service only and that the PPC pays AT&T the full tariffed rate for that service.[3] The Bureau concluded that since each customer pays the full tariffed rate for the service received, there is no unlawful rebate.

3. The Bureau did, however, find one aspect of AT&T's plan unlawful: AT&T's contract provision requiring a PPC to deliver all "1+" traffic to AT&T to qualify for commissions for "0+" traffic. While not applying a strict Clayton Act analysis, the Bureau reviewed the policy behind tying prohibitions in the antitrust laws and determined that AT&T's bundling of its "0+" commissions with its "1+" service resulted in an anticompetitive impact and, therefore, constituted an unreasonable practice under Section 201(b) of the Communications Act.[4] Specifically, the Bureau determined that AT&T was using its market power in the "0+" market to induce PPCs to purchase "1+" service from AT&T that the PPCs may have wanted to purchase elsewhere. The Bureau found that this tie/bundling arrangement effectively foreclosed competition for PPCs' "1+" business.

4. ITI and AT&T have now challenged certain findings and conclusions in the Bureau's *PPCP Order*, with each party opposing the other's submission. We address each of the parties contentions below.

III. DISCUSSION

A. Section 203(c)(2) -- Rebates

1. Statement of the Issue

5. Section 203(c)(2) of the Communications Act[5] prohibits common carriers from rebating the lawful charges contained in their tariffs. At issue is whether the commissions that AT&T pays to PPCs are illegal rebates within the meaning of Section 203(c)(2).

2. Position of the Parties

6. In its petition for reconsideration, ITI contends that the Bureau erred in concluding that AT&T's commission payments do not constitute unlawful rebates. ITI maintains that under the Supreme Court's holding in *United States v. Braverman*, 373 U.S. 405 (1963) (*Braverman*), commissions such as those paid by AT&T to PPCs are unlawful rebates. ITI argues that while not the users of "0+" service, PPCs are nevertheless the customers for "0+" service since they alone negotiate with AT&T to provide the services to the end user public. ITI argues that, in any event, *Braverman* makes it clear that rebates to any person are prohibited.

7. AT&T argues that the Bureau correctly held that commission payments to PPCs are not rebates since they are not paid to the customer of the "0+" service (the end user), but rather to the subscribers (PPCs) of the "0+" service.

3. Decision

8. The Bureau correctly found that it is not unlawful *per se* for AT&T to pay commissions to PPCs to compensate them for their costs in making operator services available to the end user. PPCs are not customers of AT&T's "0+" services and, therefore, the commissions paid to the PPCs based on "0+" revenues do not constitute unlawful rebates of tariffed charges.[6] Although PPCs subscribe to AT&T's

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[1] Under the Plan, commissions are paid to private payphone companies based on revenues generated by "0+" or non-sent paid calls. "0+" or non-sent paid calls include collect calls, calls billed to a third telephone number, and calls billed to telephone calling cards.

[2] The Bureau has referred ITI's petition to the Commission pursuant to Section 1.106(a)(1) of the Commission's rules, 47 C.F.R. § 1.106(a)(1).

[3] "1+" calls or sent-paid calls are calls billed to the telephone from which they are placed. In this case, the calls are billed to the private pay telephone owner or the lessee of the pay telephone.

[4] 47 U.S.C. § 201(b) (1991).

[5] 47 U.S.C. § 203(c)(2) (1991).

[6] The anti-rebate provision of the Act states, in pertinent part,

"0+" service, the PPCs are not customers for purposes of evaluating whether the commissions constitute unlawful rebates. Based on the record in this case, it is clear that the customer is the caller or the billed party; that is the entity receiving and paying for long distance service pursuant to AT&T's applicable tariff.[7] Because the customer continues to pay AT&T thetariffed rate, there can be no unlawful rebate. Although PPCs receive payments from AT&T in the form of commissions determined by the volume of "0+" calls, these payments are not based on any tariffed service purchased by PPCs.

9. Contrary to ITI's contention, this conclusion is fully consistent with *Braverman*. In *Braverman*, it was alleged that a shipping company manager violated Section 1 of the Elkins Act[8] "by having knowingly solicited from a freight forwarder concessions and rebates respecting interstate motor carrier shipments of Jergens' goods so that, had the rebates been granted, goods would have been shipped at a lower rate than that named in the applicable tariffs filed with the Interstate Commerce Commission." 373 U.S. at 405. It was not alleged that the shipper would have benefitted. The Court held that the government need not prove a benefit to the shipper because, under the Elkins Act, it does not matter for whose benefit the rebate is granted, but that goods are shipped at less than the tariffed rate. *Id.* at 406. The Court noted that railroad employees charging more than the tariffed rate violate criminal statutes under the Interstate Commerce Act even though they act for their own gain, and not for the railroad. *Id.* at 408.

10. The factual circumstances in *Braverman* and the cases cited therein[9] are clearly distinguishable from those in the present proceeding. The critical distinction is that payment of commissions to PPCs does not reduce the tariffed rate paid to the carrier by the customer. Once the "0+" call is completed, the customer pays the full tariffed rate and the only relationship between the carrier and the payphone owner is an arms-length business relationship. Thus, the major principle enunciated in *Braverman*, that the customer is to pay and the carrier is to receive the published tariffed rate, is not violated here. In sum, the commissions at issue here are paid not to the customer but to PPCs acting in their capacity as service providers. Accordingly, the Bureau properly concluded that commissions paid to PPCs based on "0+" revenues are not rebates under Section 203(c)(2) of the Communications Act.[10]

B. Section 201(b) -- Bundling

1. Statement of the Issue

11. Section 201(b) of the Act declares unlawful any carrier practice that is unjust or unreasonable. In the *PPCP Order*, the Bureau found that AT&T's tying of its "0+" service to its "1+" service violates the underlying policy goals of the antitrust laws, and is, therefore, unreasonable under Section 201(b).

2. Position of the Parties

12. In its application for review, AT&T asks this Commission to vacate that part of the *PPCP Order* finding that the plan violates Section 201(b) of the Act by conditioning the payment of "0+" commissions on the delivery of "1+" service to AT&T. AT&T argues that its "0+" and "1+" marketing practice with respect to PPCs does not condition the sale of one service on the purchase of another since the services are sold to separate sets of customers, the PPC and the end user. It asserts that both "1+" and "0+" services are readily available from AT&T as well as other operator service providers as separate unlinked products. Therefore, AT&T argues, its packaging imposes no unreasonable restraint on trade. Moreover, AT&T argues that communications service is not a commodity subject to the Clayton Act. Finally, AT&T asserts that it has expressly informed all participants in the Plan that any requirement that PPCs designate AT&T as their primary interexchange carrier (PIC) and deliver all "1+" traffic to AT&T will not be enforced.[11] While disagreeing with the Bureau's finding under Section 201(b), AT&T further argues that the *PPCP Order* should be vacated to the extent that it directs AT&T

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that "no carrier shall ... refund or remit by any means or device, any portion of the charges so specified...." 47 U.S.C. § 203(c)(2).

[7] In a 1988 decision directing the presubscription of public pay telephones, the United States District Court for the District of Columbia noted that while the premises owner is the subscriber, he is not necessarily the customer. *United States v. Western Electric Co., Inc.*, 698 F. Supp. 348 (D.D.C. 1988). Rather, the court observed, the customer is either the individual making the call or the billed party. *Id.* at 361, 364. Since current technology does not permit the customer to access its preferred interexchange carrier just by dialing "0+", unless the phone is presubscribed to that carrier, the District Court determined that in the interim, the premises owner should serve as the customer's surrogate -- "like that of the owner of a hotel or of a public telephone not affiliated with a Regional Company. These owners exercise the choice of an interexchange carrier for those using their facilities." *Id.* at 364, n.76. The District Court noted that this choice is likely to be based not on price or service, but, on the amount of commissions paid to the premises owner. *Id.* at 367. The Commission recently adopted rules and policies that require that competitive payphone owners (PPOs) provide end users' unblocked access to the end users' preferred interexchange carrier (using an access code) if such carrier differed from the PPO's presubscribed carrier. These rules and policies also establish a non-commission form of compensation to be paid to the PPO for such access code calls. *See* Policies and Rules Concerning Operator Service Access and Payphone Compensation, CC Docket No. 91-35, Second Report and Order, 7 FCC Rcd 3251, 3255-57 (1992), *recon.* 7 FCC Rcd 4355 (1992). This development, however, does not alter the rationale of this order since payphone commission plans will continue to be used for that traffic routed to the PPO's presubscribed carrier.

[8] 49 U.S.C. § 41.

[9] *See, e.g., United States v. Milwaukee Refrigerator Transit Co.*, 145 F. 1007, 1012 (C.C.E.D. Wis. 1906); *United States v. Delaware, L. & W. R. Co.*, 152 F. 269, 273 (C.C.S.D.N.Y. 1907).

[10] Moreover, as the Bureau correctly noted, under our accounting rules commission payments such as those at issue here have traditionally been treated as expenses. *See PPCP Order*, 6 FCC Rcd at 5836. This longstanding accounting classification is consistent with our finding that, rather than representing unlawful rebates, such payments are instead legitimate business expenses incurred by AT&T to compensate PPOs for the rental and maintenance of the space occupied by the payphone and for access to the telephone user. *See id.*

[11] In this regard, AT&T attached to its Applications for Review a copy of an October 7, 1988 letter, dated after the *PPCP Order* was released, which AT&T said was sent to its PPC customers informing them that the requirement to deliver "1+" traffic would not be enforced.

to stop conditioning participation in the Plan on delivery by PPCs of all "1+" traffic because AT&T has discontinued the requirement.

13. ITI opposes AT&T's application for review arguing that the Bureau correctly found that AT&T's practice of requiring the PPC to deliver all "1+" traffic to AT&T as a condition for the receipt of "0+" commissions suppresses competition for "1+" service. Citing AT&T's market domination, ITI disagrees with AT&T's contention that "1+" and "0+" services are readily available as separate products. In addition, ITI asserts that it is irrelevant whether the Clayton Act applies to telecommunications transmissions because bundling interferes with the Commission's policy of free and open competition. Finally, ITI argues that AT&T's discontinuance of an unlawful practice is not sufficient grounds to vacate the *PPCP Order*.

3. Decision

14. We find AT&T's arguments unpersuasive. The key aspect of AT&T's Plan is that two separate product markets are linked.[12] In order to receive commissions for "0+" traffic, AT&T's packaging forces the PPC to deliver all "1+" traffic to AT&T, a service that the PPC may not desire from AT&T. The appropriate inquiry then is not whether there are two sets of customers, but whether AT&T has foreclosed competition in the "1+" market through the strength of its position in the "0+" market.

15. We concur with the Bureau's rationale that "0+" and "1+" services are sufficiently different to be treated as two different services for purposes of this analysis. As the record reflects, customers generally use them in different contexts. Operator assisted services are generally directed to members of the traveling public; that is, customers who are away from home. Customers use "1+" service when they want to be billed at the telephone from which the call is placed. Notably, AT&T charges customer surcharges for placing different types of operator assisted calls. Most significantly, the two services are marketed in a different manner and some companies can provide "0+" services but not "1+" services and some companies provide "1+" services but not "0+" services. Thus, we conclude there is a sound evidentiary basis to support the conclusion that AT&T has linked separate product markets by bundling "0+" and "1+" services.

16. We also conclude that, without regard to whether it may violate the antitrust laws, AT&T's practice of bundling its "0+" and "1+" services constitutes an unreasonable practice in violation of Section 201(b) of the Communications Act. We have recently found that it is premature to reach firm conclusions regarding the nature and extent of competition in the operator services market.[13] Until such time that we determine the operator services market to be substantially competitive, we remain concerned about AT&T's ability to use its position in the "0+" market to create leverage or gain unfair advantage in the more competitive "1+" market.[14]

17. In addition, we decline to vacate the *PPCP Order* as requested by AT&T. Compliance with Commission and staff orders is expected at all times, and compliance therewith does not, by itself, constitute grounds for vacating such orders.

C. Section 202(a) -- Unlawful Discrimination

1. Statement of the Issue

18. Section 202(a) of the Communications Act[15] prohibits common carriers engaged in interstate and foreign communications from making unjust or unreasonable discriminations in their charges, practices, and classifications in the provision of like communications services. At issue is whether AT&T has unlawfully discriminated by paying commissions to PPCs who participate in its Plan while not paying commissions to those who are not in the Plan.

2. Position of the Parties

19. The crux of ITI's argument is that the Bureau failed to adequately address whether AT&T's Plan violates Section 202(a) of the Communications Act. According to ITI, AT&T is clearly engaged in discriminatory practices because AT&T pays commissions to PPCs who participate in the Plan but does not pay commissions to PPCs who do not participate even though the "0+" service is identical. Petition for Reconsideration at 6. AT&T's opposition does not address this aspect of ITI's petition.

3. Decision

20. In light of our affirmance of the Bureau's finding that AT&T's practice of tying commissions on "0+" and "1+" service is unlawful under Section 201(b), we see no remaining possible discrimination. There is nothing in the record to indicate that AT&T limits participation in its Plan other than a minimum level of revenue requirement.[16] There has been no showing that this minimum level requirement is discriminatory or otherwise unreasonable.

D. Section 203(c) -- Tariffing of Rebates

1. Statement of the Issue

21. Section 203(c) of the Act requires that common carriers file with the Commission classifications, practices and regulations which affect their charges.

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[12] *See Jefferson Parish Hospital District No. 2. v. Hyde*, 466 U.S. 2, 21 (1984) ("...a tying arrangement cannot exist unless two separate product markets have been linked.").

[13] Competition in the Interstate Interexchange Marketplace, Report and Order, CC Docket No. 90-132, 6 FCC Rcd 5880, 5907 (1991), *recon.* 7 FCC Rcd 2677 (1992).

[14] With respect to ITI's argument that AT&T's Plan is anticompetitive in violation of Section 314 of the Act, 47 U.S.C. § 314, (and therefore not in the public interest), with the exception of the tying of "0+" and "1+" service that has been held unlawful by the Bureau, there is no evidence before us demonstrating that the offering of commissions to PPCs is anticompetitive. There appear to be no restraints, for example, on the ability of competitors to obtain business by offering similar or higher commissions than AT&T.

[15] 47 U.S.C. § 202(a) (1991).

[16] The record indicates that AT&T does not pay commissions on "0+" or non-sent paid revenue of $833.32 and below per month.

2. Position of the Parties

22. ITI argues that the Bureau failed to address whether the commissions that AT&T pays must be tariffed.

3. Decision

23. This issue is pending before the Commission in a petition for declatory ruling filed by National Telephone Services, Inc., File No. ENF-88-12. The fully developed record in that proceeding should facilitate resolution of this issue. Therefore, in the exercise of our discretion, we will address the tariffing issue in that proceeding. We anticipate ruling on this issue shortly.

IV. CONCLUSION

24. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 201-205, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 201-205, and 405, that the Petition for Reconsideration filed by International Telecharge, Inc. and the Application for Limited Review filed by American Telephone & Telegraph Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-342

In re Applications of

LOWREY COMMUNICATIONS, L.P.	File No. BPH-881026MC
NORTH GEORGIA RADIO II, INC.	File No. BPH-881026MD
RADIO CENTER DALTON, INC.	File No. BPH-881026MK

For Construction Permit for a
New FM Station on Channel 283A
at Dalton, Georgia

Appearances

Denise B. Moline on behalf of Lowrey Communications, L.P.; *Gary Smithwick* and *J. Daniel Gillick* on behalf of North Georgia Radio II, Inc.; and *Frank J. Martin* on behalf of Radio Center Dalton, Inc.

DECISION

Adopted: October 22, 1992; Released: November 2, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

Board Member BLUMENTHAL:

1. Before the Review Board is the *Initial Decision*, 7 FCC Rcd 980 (1992) (*I.D.*) of Administrative Law Judge Richard L. Sippel (ALJ) granting the application of North Georgia Radio II, Inc. (NGRI) for a new FM station at Dalton, Georgia. Exceptions to the *I.D.* were filed by Lowrey Communications, L.P. (LCLP) and Radio Center Dalton, Inc. (RCDI) and contingent exceptions were submitted by NGRI. The three parties further propounded reply exceptions.

BACKGROUND

2. Following the completion of an evidentiary hearing on the standard comparative issue designated below,[1] the ALJ specified the following additional issues against LCLP:[2]

> [1] To determine whether Capital Radio Services, Inc. was an undisclosed principal in the application of LCLP.
>
> [2] To determine whether the structure of LCLP was a "sham" application when it was filed, or at any time thereafter.
>
> [3] To determine whether LCLP possesses the basic qualifications to become a licensee of the FM station allocated for Dalton, Georgia.

I.D., at para. 3. These issues were resolved in LCLP's favor by summary decision in *Memorandum Opinion and Order*, FCC 91M-3360, released December 2, 1991 (*MO&O*).[3] In the ensuing *I.D.*, the ALJ determined that NGRI's application was the superior proposal under the standard comparative issue, applying the Commission's *Policy Statement on Comparative Broadcast Hearings* (*Policy Statement*), 1 FCC 2d 393 (1965), and its progeny. *I.D.*, para. 110.

3. In brief, the *I.D.* awarded to NGRI 100% quantitative integration credit for its proposal to integrate sole voting stockholder Werner E. Wortsman, a long-term Dalton resident with substantial broadcast experience and a background of local civic involvement, into the management of the applicant's proposed station. *Id.*, paras. 99-100. The ALJ denied credit to LCLP concluding that application promoter and consultant Capital Radio Services, Inc. (Capital), although not a real party-in-interest, had nonetheless been "left in a position 'to exercise significant control over the applicant.' *Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5600 (Comm'n 1991)," rendering unreliable LCLP's proposal to integrate general partner Jean S. Lowrey into the management of the proposed station. *I.D.*, at paras. 85-98. RCDI received only 2.5% integration credit, the ALJ having determined that the integration proposals of its 75% and 20% voting stockholders were not credible in view of their ongoing respective business and employment commitments. *Id.*, paras. 42, 101-06, 110.

4. The parties except extensively to the *I.D.*'s findings and conclusions: NGRI and RCDI except also to the ALJ's summary resolution of the LCLP issues in the underlying *MO&O*. Based upon our review of the *I.D.* and *MO&O* in light of these exceptions and the underlying record, and for the reasons discussed below, we adopt the ALJ's findings of fact and conclusions of law, except as modified herein. We are constrained to reverse the ALJ's ultimate conclusion, however, and hold that Commission precedent mandates the grant of LCLP's application.

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[1] *See Hearing Designation Order* (*HDO*), 5 FCC Rcd 4822 (M.Med.Bur. 1990).

[2] *See Memorandum Opinion and Order*, FCC 91M-1686, released May 22, 1991 (granting the Motion to Enlarge Issues filed by NGRI on January 8, 1991).

[3] The ALJ afforded the parties the opportunity to conduct discovery on the added issues and scheduled a Phase II Hearing to commence October 7, 1991. On September 13th, LCLP filed a motion for summary decision of the three issues. The ALJ held a prehearing conference on September 23rd and heard oral argument on whether to proceed with the scheduled hearing or to resolve the extant issues summarily based on the parties' written submissions. He invited LCLP to supplement its motion and NGRI and RCDI to file a cross-motion for summary decision. *I.D.*, para. 7. The ALJ's subsequent findings and conclusions expressed in the resulting *MO&O* granting LCLP's summary decision motion are incorporated by reference into the subject *I.D.* (at para. 4).

INITIAL DECISION

5. *Lowrey Communications, L.P.* LCLP is a Georgia "limited partnership" comprised of the following principals holding the specified equity interests in the applicant entity:

Jean S. Lowrey	General Partner	24.95%
William L. Barnwell	Limited Partner	3.95%
Randy Beckler	Limited Partner	11.85%
William M. Blackman	Limited Partner	3.95%
D. Stan Easley	Limited Partner	3.95%
C. Homer Fuller	Limited Partner	7.90%
Carl F. Hawkins, Jr.	Limited Partner	3.95%
William W. Keith III	Limited Partner	3.95%
G. Jerry King	Limited Partner	3.95%
Gregory L. Lyle	Limited Partner	3.95%
Maryanne L. McDaniel	Limited Partner	3.95%
Earl W. Miles	Limited Partner	11.85%
John D. Richmond, M.D., P.C., Profit Sharing Plan and Trust	Limited Partner	3.95%
E. Trammell Scott	Limited Partner	3.95%
Rudy M. Shirley	Limited Partner	3.95%

LCLP Exh. 1, at 1-2. All but one of the partners has a Dalton address. *Id.*, at 53-67. As LCLP's sole general partner, Jean S. Lowrey has 100% voting control over the partnership.

6. LCLP's limited partnership agreement and certificate of limited partnership were signed by its fifteen principals in October 1988, prior to the application's filing on October 26th. LCLP's articles of limited partnership include provisions insulating the limited partners from serving as employees or otherwise participating in the conduct of the partnership's business. *Id.*, at 37-38; *I.D.*, para. 14. LCLP's certificate of limited partnership was filed with the offices of the Georgia Secretary of State on December 15, 1988. LCLP Exh. 1, at 22; *MO&O*, para. 5.

7. In order to fully address the parties' exceptions and to analyze the ALJ's findings and conclusions relating to LCLP, it is necessary first to recount the factual underpinnings of the LCLP entity and its application. Such review further requires an examination of LCLP's "general contractor." Capital Radio Services, Inc. LCLP and its application are the product of the marketing efforts of Capital, a Maryland-based company, founded by Carl W. Hurlebaus, offering "turnkey application services for various FCC licensing opportunities as well as the acquisition and development of construction permits for new FM radio stations." *MO&O* at para. 6 (quoting NGRI and RCDI Opposition to Motion for Summary Decision [Joint Opposition], Exhibit 1 at 1).[4] In the promotional materials distributed by Capital's salesman, Styles E. Caldwell,[5] to potential limited partners, Capital's services are described as follows:

> Capital plays the crucial role of introducing qualified general partners to investors. Once a group is assembled, the general partner works with the investment group to secure a FM license. *The applicant group* --with Capital's support--*then makes all determinations concerning the prosecution of the application and, if successful, the construction and operation of the station.*
>
> ***
>
> Capital minimizes the licensing fees necessary to acquire new FM radio stations by recommending engineers, lawyers, financial and programming consultants who provide flat rate services which are substantially *below* normal costs.
>
> Essentially, Capital serves as General Contractor in the formation of applicant groups consisting of a) individual applicants or investor groups desiring a substantial ownership interest in radio as an investment and b) Management personnel qualified and willing to operate the stations, once constructed. Typically, an applicant group for a market will desire to formalize its structure by forming a limited partnership or other entity which differentiates the roles of active management vs. passive owners. Hence, Capital arranges for communications attorneys to work directly with the applicants in preparing and executing proper ownership agreements. This service is provided as part of the turnkey package and there is no additional cost.

NGRI Exh. 27, at 45-46 (emphasis added). Capital Radio Services, Inc. is affiliated through a common board of directors with Capital Radio Holdings, Inc.,[6] a broadcast acquisition company that "locates, analyzes, purchases, operates, and manages existing commercial radio properties on a longer term basis . . . [and] offers consulting and management services to Capital Radio Services, Inc." Joint Opposition, Exhibits 1-2; *MO&O*, at para. 6 n.3.[7]

8. In 1988, Capital determined that the opening of an application filing window for a new FM channel allotment to Dalton, Georgia, presented a "highly viable investment opportunity." Joint Opposition, Exhibit 4.[8] Capital, acting

[4] Portions of Capital's promotional brochure were identified on the record at hearing as NGRI Exh. 27.

[5] As NGRI and RCDI note in their briefs, Hurlebaus and Caldwell were previously associated with Sonrise Management Services, Inc. (Sonrise). *See* NGRI Contingent Exceptions, at 11; RCDI Reply Exceptions, at 7. *See also* Joint Opposition, Transcript Pages Volume, Caldwell Depo. Tr. 7-8, 12 & Hurlebaus Depo. Tr. 156-59.

[6] Carl W. Hurlebaus also serves as president of Capital Radio Holdings, which is owned and managed by Hurlebaus and Capital Radio Services' other directors. Joint Opposition, Exh. 2.

[7] Capital's promotional materials state that Capital Radio Services is developing new FM radio stations in Wisconsin and Ohio and that Capital Radio Holdings owns interests in and operates radio stations in Virginia and South Carolina. Joint Opposition, Exh. 1.

[8] Joint Opposition Exhibit 4 is a memorandum from Carl W.

through Caldwell, began to solicit investors to form a group to apply for the channel by August of that year.[9] *MO&O*, para. 6; Joint Opposition, Exhibits 4-5. On or about August 22nd, Caldwell approached Dr. William M. Blackman about forming an investor group to file an application for the Dalton allotment. Blackman was already an investor in another Capital radio application. On the following day, Caldwell sent Blackman a letter discussing the development of a "marketing approach" for Dalton and attaching a computer-generated list of thirty-five potential investors including Rudy Shirley, Bill Barnwell, Randy Beckler, John Richmond, and Earl Miles. Blackman and these five individuals later became limited partners of LCLP. The list also included the name of Pleas Smith, Jean Lowrey's father. Joint Opposition, Exhibit 5, Caldwell Deposition Tr. 32-34 & Blackman Deposition Tr. 6.

9. Blackman reviewed Caldwell's list of potential investors and preliminarily assessed the likelihood of their participation in an application group.[10] On or about September 6th, he attempted to contact many of the listed individuals, including future LCLP limited partners Shirley and Barnwell. Joint Opposition, Exhibit 5 & Blackman Deposition Tr. 6-12. Blackman declined Caldwell's request to serve as general partner of the forming Dalton application group but recommended that Caldwell contact Pleas Smith about whether Smith's daughter, Jean S. Lowrey, might be interested. Joint Opposition, Blackman Deposition Tr. 14-15.

10. Acting on Blackman's advice, Caldwell telephoned Smith and Smith agreed to call Jean Lowrey about participating in a Dalton application group. Joint Opposition, Caldwell Deposition Tr. 68. Smith telephoned his daughter, informed her of the opportunity, and told her that his friends were interested in participating in such an investment. Tr. 42-44, 289-91. Smith then called Caldwell back to convey his daughter's tentative interest. Tr. 296. A few days later, on September 7th, Jean Lowrey, her husband and Smith met with Caldwell at Smith's office. *I.D.*, para. 17; *MO&O*, paras. 6-7; Tr. 50-51. Caldwell gave Lowrey Capital's promotional brochure and described the investment opportunity, the FCC's procedures and comparative preferences, and the services that would be furnished by Capital. Tr. 51-55, 212-13, 218. Lowrey later telephoned Carl Hurlebaus at Capital's Maryland offices to confirm the information imparted by Caldwell. Tr. 209-10. Once Lowrey agreed to participate, Smith called more of his friends in an effort to solicit investors to form LCLP. Tr. 296-99.

11. On September 14, 1991, Lowrey again met with Caldwell and signed an "FM Service Agreement for Owner/Manager" (Service Agreement), thereby hiring Capital to serve as a general contractor to form an applicant group and to prepare and file an application to the FCC for the new Dalton FM channel. *MO&O*, para. 8; Tr. 111-23. Pursuant to the Service Agreement's provisions, Capital agreed to provide Lowrey the following services:

> * Introducing you to other potential owners who are interested either in active management or passive investment, whom you may want to join with you to form an entity to apply for the new station;
>
> * Assisting you in the acquisition of [a] transmitter site and documentation of site data;
>
> * Preparing all engineering requirements of FCC Form 301;
>
> * Assisting in the completion of the remainder of the FCC Form 301 based upon the information you provide to Capital;
>
> * Arranging for all printing and production work for a completed application;
>
> * Application review and delivery to FCC counsel in a timely manner, subject to your timely providing the necessary information requested by Capital and its consultants;
>
> * Recommending counsel for full legal representation before the FCC through all comparative proceedings and decision by an Administrative Law Judge.

NGRI Exh. 18, at 1. The agreement further provided that "Capital may assist you in arranging financing for the capital construction and initial operating costs of building and operating the station, as well as ongoing management services." *Id.* Capital agreed that upon Lowrey's execution of the Service Agreement it would "notify [her] promptly of the identity of other potential members of the group." *Id.*[11]

Hurlebaus to Styles Caldwell dated August 30, 1988, describing the potential "Stick Value" of the future Dalton FM station. The memorandum was responsive to Caldwell's earlier request for a "market report" on the Dalton allotment. Joint Opposition, Transcript Pages Volume, Caldwell Depo. Tr. 20 & Hurlebaus Depo. Tr. 67.

[9] Caldwell's solicitation of investors for a Dalton application may have begun earlier. According to an affidavit of Gilbert H. Watts, Jr., a principal of competing applicant RCDI, Caldwell approached him in February or March 1988 about investing in various Capital application groups. Caldwell also mentioned the then pending rulemaking proceeding to allot an FM channel to Dalton. Caldwell obtained Watts' name from Paul Belk, who later became an LCLP limited partner. *See* Joint Opposition, Exh. 46 & Caldwell Depo. Tr. 21-23, 46.

[10] Blackman's handwritten notations appear in Exhibit 5 of the Joint Opposition. *See* Joint Opposition, Blackman Depo. Tr. 6-13.

[11] Lowrey also accepted the following provisions contained in the Service Agreement:

> You warrant that you will provide in a timely fashion when requested by Capital full accurate, and complete information concerning your legal, technical, managerial, financial and other qualifications to obtain the requested Broadcast authority. You acknowledge that failure to provide full, complete, and accurate information could hinder Capital's role in advising you in the proper preparation of your application and/or could prejudice your application before the FCC . . .
>
> You agree not to re-sell or provide any application provided by Capital to any other person or entity, without the express written permission of Capital.

12. Lowrey took a 24.95% ownership interest in the applicant group to be formed to apply for the Dalton frequency. *Id.*[12] She further consented to pay Capital's stated fee of $23,050 as set forth in the promissory note annexed to the service agreement.[13] Lowrey agreed to pay Capital $5,550 in cash upon execution of the note and the balance of $17,500 upon her receipt of cash proceeds in excess of that amount from either (1) settlement, merger or buyout of the application; (2) station earnings exclusive of employment compensation; or (3) the sale of the station or of substantially all of its assets. Should the application prove unsuccessful, Lowrey could satisfy the note in full by paying Capital $100 within thirty days of the FCC's final order. *MO&O*, para. 8; NGRI Exh. 19; Tr. 119-30.[14] According to Lowrey, Capital's $23,050 fee was to pay for the location of a tower site and the preparation of the engineering section of the application. Tr. 154-56.[15] Upon her execution of the Service Agreement and the accompanying promissory note, Lowrey gave Caldwell a personal check payable to Capital Radio Services, Inc., in the amount of $5,550. *I.D.*, para. 4; Lowrey Exh. 5.

13. Lowrey testified that she put together her own investor group to apply for the Dalton channel without utilizing Capital's investor recruitment services. Tr. 66.[16] The record reflects that Caldwell and Smith, with help from Blackman, were the primary recruiters of the limited partners and that Lowrey made none of the initial contacts. Tr. 294-97, 299-302. Once the investors were called by one of the three gentlemen, Caldwell visited them *sans* Lowrey. Tr. 297. He then prepared the paperwork to cement their participation in the group and their affiliation with Capital.[17] In early September, he again visited the investors, often accompanied by Lowrey, and had each of them complete two forms supplied by Capital: a worksheet entitled "FM Radio Station Applicant Questionnaire" and an agreement styled "Capital Radio Services, Inc. FM Service Agreement for Passive Investor" (Passive Investor Agreement). Tr. 304-05.

14. At the hearing, Lowrey stated that she, not Caldwell, had procured the limited partners' participation in the application group by collecting their contributions and completed Capital questionnaires and Passive Investor Agreements. Tr. 303-06.[18] She set aside two days from her schedule to accomplish this task. Tr. 99. Lowrey testified that Caldwell delivered the paperwork to her (with pertinent information already filled in); that he accompanied her on visits with the investors; and that she handed the completed forms and capital contributions back to him. Caldwell then forwarded the completed questionnaires to Lowrey's attorney for use in preparing the application. NGRI Exhs. 11, 15; Tr. 96-97.[19] It was from the responses to the questionnaires that Lowrey learned that several of the investors were participants in other Capital Radio applications. Tr. 292-93. Caldwell transmitted the executed Passive Investor Agreements to Capital. These agreements, which are variously dated September 16, 17, 18, 19, and 20 (one is undated), provide, *inter alia*, that:

> Whereas you wish to become involved in the ownership of a new radio station as a passive investor, you are hereby retaining Capital to introduce you to a person or persons who intend to be involved in the active management and ownership of a new radio
>
> * * *
>
> This agreement constitutes the entire agreement and understanding between you and Capital and neither Capital nor you rely on any oral representations or other writing.

NGRI Exh. 18, at 2-3.

[12] Lowrey testified that she had decided to hold a 25% equity interest in the applicant group based on the amount of capital she was able to contribute relative to Caldwell's projection of an initial capitalization of $100,000 to cover the preparation and prosecution of the application (and the payment of Capital's fee). Tr. 147-51, 173-75. The partnership units were then set at about 4%, or an initial contribution of $4050 per share. Tr. 147, 172.

[13] Lowrey initially testified that she had negotiated the amount of Capital's fee. Upon further examination, however, she conceded that Styles Caldwell had presented her the promissory note with the $23,050 figure already included and that Lowrey had simply acceded to the amount by signing the note. Tr. 153-54. The amount of Capital's actual fee is under dispute. *See infra* paras. 23-24.

[14] As will be amplified below, the promissory note was cancelled by Capital in 1990 without any further payment by Lowrey or LCLP. NGRI Exh. 24; Tr. 319. *See infra* paras. 20, 23.

[15] Lowrey testified that the fee actually covered seven services offered by Capital but that she "accepted" only the site and engineering services. She further declared that she had *not* accepted Capital's services to "help put together an investor group." Tr. 51-53, 66, 155.

[16] She also later testified that Capital had assisted her in the sales of the limited partnership interests and that Caldwell had contacted potential investors prior to her involvement in the project. Tr. 171, 301.

[17] Upon questioning at hearing regarding the preparation of the passive investor agreements for signature, Lowrey testified:

> A. The information was filled in [on the Passive Investor Agreements], I don't know who typed it, but *I provided the information based on the limited partners that I chose and contacted to be part of the partnership.*
>
> Q. Who did you provide this information to?
>
> A. I provided it to Styles Caldwell.

Tr. 132-33 (emphasis added).

[18] At disposition Lowrey had testified:

> Question:. . . Did you have any role to play in getting -- inducing the passive investors to sign [the Passive Investor Agreements]?
>
> Answer: Not in inducing them to put their signature on the page, no. I hoped that the fact that I was general partner, and they knew that, would have at least indirectly played a role in encouraging them to join.
>
> Question: It was acturally Mr. Caldwell who went out and made contact with these people and got them to sign this paper; is that right?
>
> Anser: Yes, it was.

Tr. 304-05.

[19] Lowrey, too, filled out a questionnaire and submitted it to Caldwell to send to her attorney. Tr. 217.

> station and intend to file an FCC application for an FM radio broadcast license allocated to the city of Dalton, Georgia.
>
> Capital is entering into a turnkey application service agreement with the owner/manager of this proposed new station (the "Owner/Manager"), and will arrange with Owner/Manager that you be included as a member of an investor group that will file with the FCC for the license to own and operate the station.

NGRI Exhs. 5-17.[20] Each investor additionally made a capital contribution proportionate to its proposed ownership share.[21] Checks were made payable to Capital Radio Services, Inc., and were collected by Caldwell (or by Lowrey who then handed them over to Caldwell) and sent to Capital's Maryland offices where, according to Lowrey, such funds were to be held in escrow pending the organization of the partnership and the opening of a bank account. Tr. 101-02, 157, 179.

15. Capital recommended two communications law firms to Lowrey for the preparation of the Dalton application. Tr. 176. Lowrey telephoned one of the two firms, McCabe & Allen, and retained that firm. Tr. 177-78.[22] Due to the firm's connection with Capital, Lowrey received legal services for the prearranged capped legal fee of $30,000--an initial retainer of $5,000 and an additional flat fee of $25,000 for the comparative hearing. Tr. 176-78. After opening a partnership bank account on October 18, 1988, Lowrey paid the law firm's $5,000 retainer from funds sent by Capital. Tr. 178-79. Lowrey's counsel drafted the limited partnership agreement and related documents. Tr. 144-46. Lowrey and the limited partners signed the certificate of limited partnership on October 10-12, 1988. LCLP Exh. 1. Lowrey claims the form and structure of LCLP were her and her father's idea, but the ALJ found the record inconclusive as to whether it was Lowrey or Caldwell who had actually designed the structure of the applicant. *I.D.*, n.3; Tr. 57.[23]

16. Lowrey worked directly with counsel to prepare LCLP's application. With counsel's assistance, she obtained equipment cost estimates, prepared a budget, and obtained a bank letter. *I.D.*, para. 21. Capital recommended two engineering firms and she picked one of them at random. Tr. 141, 155, 177-78. As part of its contracted for services, Capital hired Shaffer & Associates to locate a transmitter site for LCLP.[24] Capital paid the engineering and site expenses directly, and assigned the rights to the site to LCLP. Tr. 155-57. Lowrey confirmed the availability of the site with its owner and with Shaffer & Associates. She had no contact with her engineer prior to the application's filing on October 26, 1988. *I.D.*, paras. 19, 21; *MO&O*, para. 15; Tr. 133, 137-39, 333-34.

17. In early 1989, Lowrey received notice from the Federal Aviation Administration that her tower proposal posed a hazard to air navigation. *See* Joint Comments on Reply to Joint Opposition, filed November 8, 1991 (Attachments); Tr. 139. Lowrey telephoned Hurlebaus at Capital's offices and directed him to take care of the problem. Tr. 140. She also hired an airspace consultant to ensure that the second site would satisfy the FAA. *I.D.*, para. 21; *MO&O*, para. 15; Tr. 139-40. Again, Capital arranged and paid for the work associated with obtaining the transmitter site and assigned the rights to the new site to LCLP. *See* NGRI Exh. 20.[25] Lowrey confirmed the site's availability with the owner and conferred directly with the engineer. Tr. 336.

18. After Lowrey opened a partnership account at a local bank, Capital continued to hold LCLP's capital "in escrow." Lowrey concedes that she knew few specifics about the "escrow" arrangement, even the location of the escrow account. Tr. 157-58, 315, 323-24, 327-28, 332.[26] She testified

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[20] Lowrey explained that the Passive Investor Agreements were a device necessary to organize the investor group and to subscribe to Capital's services for engineering and transmitter tower location. Tr. 66, 71.

[21] Original limited partner Paul Belk failed to make his contribution and was later replaced by William Keith.

[22] McCabe & Allen is one of the two law firms whose professional resumes are included in Capital's promotional materials. Joint Opposition, Exh. 3 at Appendix 2B.

[23] Capital's promotional materials include a blank limited partnership agreement. Joint Opposition, Exh. 3, Appendix 1E. The *I.D.* refers to an undated memorandum from Caldwell to the potential Dalton investors, which apparently was attached as a cover page to the Capital promotional materials. The memo states:

> The Dalton FM Group will consist of:
>
> One General Partner Ownership Interest of 21%---
>
> Twenty (20) Limited Partnership Interests of 3.9%- totaling $81,000 for a total partnership capitalization of $100,000.
>
> The partnership will contract the services of Capital Radio Services, Inc., to turnkey the preparation and prosecution of the application for the new FM broadcast frequency allocated to Dalton.

Joint Opposition, Exh. 7, at 1. *See I.D.*, n.3.

[24] Lowrey testified "Shaffer and Associates of Texas did the work, they located a site, they notified me of the owner." Tr. 133. The record shows that Shaffer notified Capital of the owner and then Capital forwarded that information to Lowrey. NGRI Exh. 20.

[25] *See I.D.*, para. 92; NGRI Exh. 20.

[26] The only documentation of the so-called escrow arrangement is correspondence from Carl Hurlebaus to Jean Lowrey referring to such arrangement. In a letter dated December 28, 1988, he wrote that:

> we are continuing to hold the balance of your group's capitalization for FCC legal fees in an escrow account. It is my understanding that we are to hold such funds until the date that the FCC issues a notice of "acceptance" for your application. Once this notice is issued, you will instruct me to transfer the balance of the funds to your account for expenses. *Of course, should you require these monies at any time, please advise me.*

Joint Opposition, Exh. 29 (emphasis added).

Hurlebaus wrote on August 24, 1989 (after Lowrey demanded return of LCLP's funds) that:

that the escrow arrangement was made as a convenience to LCLP, because there was no formally organized business entity or bank account yet in existence at the time the initial capital contributions were collected.[27] Lowrey explained that: "By having an escrow account through Capital Radio, we had a place to deposit our money so that we could get started as an organization, and Capital could begin the engineering and tower site services." Tr. 315. "That money was held in trust, and then it was moved at my demand to our checking account, and from that I paid the litigation fees, hearing fees, and other expenses." Tr. 323.[28] Lowrey testified that she received funds from the escrow on three occasions: (1) soon after opening the bank account in October 1988, she received approximately $7500 from Capital for payment of the $5000 lawfirm retainer and the FCC's filing fee (Tr. 181, 366); (2) upon her request in March 1989, she received approximately $300 to pay miscellaneous expenses (Joint Opposition, Exhibit 31; Tr. 132, 184); and (3) she received a final installment of $31,000 in January 1990. NGRI Exhs. 22-23, Tr. 181-83, 196-97.

19. The ALJ found that throughout the existence of the escrow arrangement, "Capital treated funds that were collected from LCLP's investors, which included all the financial assets of the venture [$82,500], in such cavalier fashion as to warrant a finding of control by Capital over the venture's funds until Lowrey terminated Capital's escrow function or about August 24, 1989." *MO&O* at para. 13. He concluded:

> In view of commingling by Capital and the lack of any internal audit or other control procedures, the monies "escrowed" by LCLP with Capital were found to be controlled by Capital until Capital's service contract was terminated. (*MO&O* at Para. 13.) Evidence of control was found in the record presented for summary decision. Hurlebaus testified in a deposition that Lowrey had confirmed Capital's right to make non-approved expenditures. (Depo. at Tr. 206.) (*MO&O* at Para. 14.) Capital also converted accrued interest and paid the taxes on that interest which was earned on LCLP's monies that were maintained in Capital's commingled account. (*MO&O* at Para. 14.)

I.D. at para. 20.

20. On or about August 10, 1989, Jean Lowrey telephoned Carl Hurlebaus to request a "divorce" from Capital and to seek return of the balance of LCLP's escrowed funds. She also asked him for a final accounting. Tr. 181, 194. Lowrey stated that she wanted to sever the relationship with Capital due to her dissatisfaction with its handling of the transmitter site several months earlier and Hurlebaus' failure to return Lowrey's calls; and her wish to obtain the funds in escrow.[29] Tr. 210-11. On August 24th, Hurlebaus sent Lowrey a letter not specifically responding to her "divorce" request, but stating that the balance of LCLP's funds and an accounting would be remitted in thirty days. NGRI Exh. 22. Hurlebaus characterized the funds currently held by Capital as "represent[ing] the balance owed (if any) under your retainer to your communications attorney and/or to the FCC for a hearing fee." *Id.*[30] Lowrey did not question Hurlebaus' description of the escrow funds.[31] On January 15, 1990, Capital sent Lowrey a check for $31,000 "reflect[ing] the balance of funds we had been holding for Lowrey Communications Limited Partnership pursuant to our original understandings." NGRI Exh. 23; Tr. 196-97. On that date, Capital, acting on LCLP's counsel's request, also sent Lowrey a release from the promissory note. NGRI Exh. 24; Tr. 197.[32]

> our original contract called for Capital to hold in trust a portion of your partnership's funds until such time as your application was accepted for filing by the FCC. If such acceptance were not granted, we were obligated to return these funds to the respective limited partners. These funds represent the balance owed (if any) under your retainer to your communications attorney and/or to the FCC for a hearing fee, and have been available to you any time upon request. However, given the lengthy processing delays at the Commission and the fact that Capital is now focusing on other communications businesses, we feel it would be in your partnership's best interest to convey the balance of funds to you at this time . . . .

NGRI Exh. 22; Tr. 323-35.

[27] When William Keith became a limited partner in November 1988, he made his check payable to Capital Radio, not to LCLP, despite the fact that by that time the partnership was formed and the bank account was open. Joint Opposition, Exh. 25. However, Keith was not required to sign a Passive Investor Agreement with Capital. Tr. 345.

[28] Hurlebaus testified at deposition that, under their agreement, Capital would continue to hold LCLP's capital contributions until such time as the Commission accepted for filing LCLP's application. If the application were found unacceptable, Capital would have refunded the contributions directly back to the investors. Joint Opposition, Hurlebaus Depo. Tr. 87-90.

[29] Lowrey testified that her decision to "divorce" Capital was unrelated to Hurlebaus' troubles arising from his entanglement with Sonrise. Tr. 211, 313-14. LCLP's opponents speculate that Lowrey's termination of Capital was in reaction to the negative publicity surrounding Sonrise after its attorney's July 1989 plane crash.

[30] Hurlebaus' December 28, 1988 correspondence had described the funds in escrow as "the balance of your group's capitalization for FCC legal fees." Joint Opposition, Exh. 29.

[31] NGRI points out in its "contingent" exceptions that Lowrey later turned down an offer Capital, conveyed to communications counsel in October 1989, offering a full refund of its fee in return for the execution of a release. The refund offer arose out of the Commission's commencement of an investigation of Sonrise which "might unfairly impact or prejudice applicants at the FCC for whom Capital . . . provided various consulting services." Joint Opposition, Exh. 35. NGRI argues that if Lowrey was then truly dissatisfied with Capital's activities with regard to LCLP, Lowrey would have accepted the refund. NGRI Exceptions at 13.

[32] The release letter provides:

> As previously discussed, all individuals comprising your application for a new FM radio station in Dalton, GA have satisfied their fee payments to Capital Radio Services, Inc. for our application preparation services.
>
> Therefore, since we have not already done so, you are forever released and discharged from any further obligations under the promissory note . . . .

NGRI Exh. 24.

21. In April 1990, Lowrey received the accounting from Capital. RCDI Exh. 4; Tr. 201-02. The accounting showed "Total Contractor Fees Paid In" as $78,450.00, an amount Lowrey claims is short by $4,050.00 (or one limited partnership share). Tr. 203, 205. The fees paid in figure represents the total initial capital contributions of Lowrey and the limited partners.[33] The accounting next subtracts $23,084.51 from the amount paid in under the designation "(Less Direct Expense Cost of Sales) Caldwell." Lowrey stated at hearing that this amount appears to be a sales commission paid to Caldwell without her permission. Tr. 353-54, 364."[34] Under the debits side, the accounting lists the following expenditures:

Engineering Expenses	$ 1320.00
Site Acquisition	560.00
General and Administrative	1237.50
Legal Review	1725.00
Clerical	780.00
Capital Radio Services	
"Includes Expenses, Services and Profits"	11,242.99
Lowrey Communications LP	
Per Contract	38,500.00
Total Debits	55,365.49

MO&O at para. 13; RCDI Exh. 4.

22. In response to the accounting, Lowrey sent Hurlebaus a letter on August 2, 1990, regarding an additional $1463.02 due LCLP for unreimbursed expenses (airspace consultant, tax services, and the FCC hearing fee increase) and the $4,050 due LCLP for the uncredited capital contribution. NGRI Exh. 25; Joint Opposition, Exh. 39. Lowrey also requested a line-item accounting and revised financial report. *Id.* Capital did not respond to the letter. No additional funds or financial information have ever been received. Tr. 183, 350.[35]

23. Lowrey testified at the January 1991 hearing that she "questioned all aspects of th[e] accounting." Tr. 375. In addition to the amount paid in $4,050 shortfall and the payment of the $23,084 sales commission to Caldwell, Lowrey disputes all of the expenditures listed. She believes the figures provided for engineering, site acquisition, and payout to LCLP are too low and that the remaining disbursements, including additional profits to Capital, are inexplicable and entirely unauthorized. Tr. 203-06, 353-54, 364-67, 375-80.[36] In her view, Capital owes LCLP an additional $20,750. Tr. 364, 366.%[37] Upon further questioning, Lowrey admitted that in retrospect she was unsure of the amount of guaranteed compensation to Capital under their agreement and that she had assumed that Capital's fee was $23,050--the amount she had originally committed. Tr. 378.[38] Thus, she believed that the capital contributions of the limited partners held in "escrow" by Capital belonged to LCLP and that the entirety of her own contribution constituted Capital's fee. Tr. 326-27. The promissory note represented Lowrey's obligation to pay the balance of the fee should the application group fail to come together. Tr. 371. The note enabled Capital to begin paying for the technical work associated with the preparation of the application knowing that the return of the funds was secure. Tr. 351. Once the limited partners made their capital contributions, "their money . . . would offset the cost of the contract [with Capital]. That would pay off the promissory note." Tr. 368.[39] Upon her request for a "divorce" from Capital, Lowrey claims that she authorized Capital to take the unpaid balance of its fee from the escrowed funds, in lieu of eventual payment through the promissory note, and to remit the balance to LCLP. Tr. 369-71, 387-88, 395, 401-03.

24. Lowrey renegotiated the retainer agreement with McCabe & Allen in July, 1990. *See* LCLP Supplement to Motion for Summary Decision, filed September 30, 1991 (LCLP Supplement), Attachment 23. In May 1991, Lowrey hired local counsel and oversaw efforts to rectify deviations of the original partnership offering from state blue sky security laws. *MO&O*, para. 18; Lowrey Supplement, Attachments 10, 18. In January and June 1991, she personally conducted capital calls and deposited the funds raised into the partnership's bank account. *MO&O*, para. 18; LCLP Supplement, Attachments 11-13. Based on all of the foregoing, the *I.D.* denied "integration" credit to LCLP but further held that "there is no finding of a basic disqualification." *Id.*, at para. 99.

25. *North Georgia Radio II, Inc.* NGRI is a two-tiered Georgia corporation in which Werner E. Wortsman is

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[33] Hurlebaus agrees that the amount paid in by LCLP was actually $82,500. Joint Crossmotion for Summary Decision, filed Oct. 21, 1991, Exh. 2 (Hurlebaus Depo. Tr.) at 70-71.

[34] The ALJ noted at hearing that the sales commission paid to Caldwell, $23,084, is remarkably, and perhaps coincidentally, close to the $23,050 figure that Lowrey maintains is the agreed-upon amount of Capital's fee. Tr. 378-79.

[35] On September 4, 1991, Lowrey's local counsel sent a demand letter to Capital for return of $20,750 to LCLP. *See* LCLP Motion for Summary Decision, filed Sept. 13, 1991, Attachment 11. On December 23, 1991, LCLP filed suit against Capital in Georgia Superior Court (Whitfield County) claiming that amount in damages. *See* Lowrey Exceptions at n.6 & 11; Lowrey Reply Exceptions at 14 & n.24.

[36] Lowrey also testified that she did not have any reasonable idea as to the costs of the engineering and site acquisition work that Capital paid directly, and thus, under her theory of their fee arrangement, she had no real idea of the actual amount of Capital's commission (which she believed to be whatever remained of the $23,050 after payment of the application engineering and site expenses and any related expenses). Tr. 322, 328-30.

[37] Capital's actions indicate its position that any funds remaining in the "escrow account" after payment of agreed-upon expenses was merely further profit for Capital. Thus, Capital retained the balance of Lowrey's capitalization but for the monies reserved for payment of counsel and the FCC's hearing fee. *See* Joint Opposition, Hurlebaus Depo. Tr. 111, 228; NGRI Exh. 22.

[38] At hearing, the ALJ commented to Lowrey that: "It doesn't seem to me as though you really did know what the name of the game was. I just didn't want to the record to keep going on, and on, and on, with what I think are just inaccurate assumptions." Tr. 379.

[39] Lowrey's understanding regarding the satisfaction and cancellation of the promissory note is essentially corroborated by Hurlebaus. *See* Joint Opposition, Hurlebaus Depo. Tr. 100, 105.

president and 100% voting stockholder.[40] Wortsman owns 40% of the corporation's equity, the remainder being held by the seven non-voting stockholders. *Id.*, para. 31-32. By an amendment filed on the "B" cut-off date and accepted by the *HDO*, NGRI substituted itself for the original applicant. North Georgia Radio, Inc., a corporation comprised of the same principals. *Id.*, para. 33. The only difference between the original and successor corporations is that Wortsman owns 40% of the voting stock in the former and 100% in the latter; the principals' relative equity positions remain unchanged. *Id.*, para. 99. The *I.D.* found that NGRI's "B" cut-off amendment complied with Section 73.3573(b) of the Commission's Rules[41] and that the resulting elevation of Wortsman's voting control to 100% was permissible under *Marlin Broadcasting of Central Florida*, 5 FCC Rcd 5751, *recon. denied*, 5 FCC Rcd 7446 (1990), *aff'd*, 952 F.2d 507 (D.C. Cir. 1992). *I.D.*, para. 100. The ALJ awarded NGRI 100% "integration" credit for its proposal to integrate Wortsman into the station's management on a full-time basis, enhanced by his long-term local residence, some civic involvement, and substantial broadcast experience. *Id.*, paras. 34-39, 100, 107.

26. *Radio Center Dalton, Inc.* RCDI is also a two-tiered Georgia corporation with the following structure featuring a blending of voting and nonvoting stock interests:

Shareholders	voting shares	% votes	nonvoting shares	% equity
G. Watts	3748	74.96	2502	25
C. Means	1000	20	4000	20
V. Watts	250	5	1000	5
C. Watts	1	.02	6249	25
V. Hoyt	1	.02	6249	25

Id., para. 42.[42] In 1988, Clifford K. Watts and Virginia Alexandra Watts Hoyt agreed to be inactive and they gave general powers of attorney to Gilbert H. Watts, Jr. and Valeria Hoyt, respectively. *Id.*, paras. 44-45. RCDI proposes to integrate Gilbert Watts and Calvin Means into the management of the station on a full-time basis and Valeria Watts on a 20-hour per week basis. *Id.*, paras. 46, 59, 61.

27. The *I.D.* refused to credit the "integration" of Gilbert Watts and Calvin Means due to the "uncertainties, inconsistencies and inconclusiveness" of their proposals. *Id.*, at para. 104. The ALJ found that NGRI failed to show how Gilbert Watts would extricate himself from his continuing management over several businesses and positions on interstate bank boards and thus, to fulfill his pledge to serve as the station's full-time chief executive officer. *Id.*, para. 101. "There was no comprehensive plan offered in evidence and there is no indication that G. Watts intends to hire any additional personnel to assume even some of his non-broadcast duties." *Id.*, at para. 55. Even assuming some reduction in Mr. Watts' current duties, the ALJ nevertheless concluded that there was no reasonable assurance that his "integration" would be effectuated. *Id.*, para. 102. A similar deficiency was found in Calvin Means' "integration" proposal. RCDI proposes that Means will continue to manage its AM station, for which it claims a "Daytimer preference," as well as the FM station on a full-time basis until such time as the AM station is divested. *Id.*, para. 103. Because "there is no plan offered to show how he will be a 'front-line' manager for two stations while the FM station is being constructed and for three years after the test signal is operative," credit was denied. *Id.*, at para. 106. *See also infra* note 51. Only Valeria Watts' part-time integration proposal received credit. *I.D.*, para. 106.

EXCEPTIONS

28. LCLP excepts, of course, to the *I.D.* for its failure to award LCLP 100% full-time "integration" credit. It disputes the ALJ's view that Capital had the potential to "control" LCLP's funds; that Capital "paid" LCLP's FCC application fees; and that Capital was the "primary promoter" of LCLP.[43] Relying chiefly on *Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5600 (1990), LCLP contends further that, whatever Capital's role at the outset, "the post-formation record will control where there is reliable evidence that the nominally controlling principal will exercise exclusive control."[44] Finally, LCLP maintains that the ALJ erred in granting 100% "integration" credit to NGRI because, it maintains, NGRI's organizational structure was (and is) too unreliable to credit.[45]

29. For its part, NGRI supports the *I.D.* insofar as its award of the permit. But it lodges "contingent" exceptions to the ALJ's grant of favorable summary decision to LCLP on the following questions: (1) whether Capital was an "undisclosed principal" in LCLP; (2) whether "LCLP was a 'sham' application"; and (3) whether LCLP should have been found basically unqualified for its involvement with Capital.[46] *See MO&O*, FCC 91M-3360, *supra*. Further, NGRI asserts that the ALJ erred when opining that, if

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[40] Wortsman is also NGRI's treasurer and sole director. The corporation's secretary is Hansel L. Smith, who owns no stock. *I.D.*, para. 31.

[41] 47 CFR Section 73.3573(b) provides that:

> A new file number will be assigned to an application . . . when it is amended so as to . . . result in a situation where the original party or parties to the application do not retain more than 50% ownership interest in the application as originally filed . . . .

[42] Like NGRI, RCDI amended its structure prior to "B" cut-off to increase the voting stock ownership of its integrated principals. As originally filed, RCDI was structured as follows:

Shareholders	voting shares	% votes	nonvoting shares	% equity
G. Watts	6250	25	0	25
C. Means	5000	20	0	20
V. Watts	1250	5	0	5
C. Watts	6250	25	0	25
V. Hoyt	6250	25	0	25

I.D., paras. 43-44.

[43] LCLP Exceptions at 4-18.

[44] *Id.*, at 18.

[45] *Id.*, at 21-23.

[46] NGRI Exceptions at 2-14. NGRI also excepts to the *I.D.*'s award of a gender preference to LCLP, *see id.*, at 17; *see also* RCDI Exceptions at 23, but the Board will disregard this preference. *Frank Digesu, Sr.*, 7 FCC Rcd 5459, 5459 n.1 (1992).

LCLP were entitled to a 100% "integration" credit it would prevail, because of NGRI's view that its principal, Werner E. Wortsman, has superior qualitative attributes.[47]

30. Like NGRI, RCDI excepts to the ALJ's failure to disqualify LCLP under a real-party-in-interest issue.[48] It also faults the ALJ for failing to reduce NGRI's integration credit "to no more than 30 hours per week" because, it posits, Wortsman is of retirement age and had previously reduced his work schedule.[49] But the bulk of RCDI's exceptions are directed to the ALJ's refusal to credit the "integration" proposal of its majority principal, Gilbert H. Watts, Jr., *see I.D.*, para. 42, because of Watts' numerous outside business interests. *See id.*, paras. 46-56. RCDI argues:[50]

> At the hearing RCDI proved that Mr. Watts normally works 70 hours or more a week, but that he has already reduced his commitments -- by divestiture of all family broadcast interests except WLSQ (RCDI's daytime AM station in Dalton) and by divestiture of other business interests as well -- only 24.5 hours a week *on matters other than WLSQ [AM]* and this application, leaving in excess of 40 hours a week to devote to fulfilling his commitment.

Not only does RCDI object to the ALJ's refusal to accept Watts' full-time proposal for this FM facility, it contends that the ALJ's action concurrently deprived it of a "Daytimer preference," since Watts and another RCDI principal, Calvin Means, propose to co-locate the FM station office with the daytime-only AM station, to which extant station Means now devotes, he says, 20 hours per week, while Watts devotes "at least" 26 hours per week to the AM facility.[51]

DISCUSSION

Lowery Communications, L.P.

31. *Real-Party-In-Interest.* As the court recently reiterated in *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1564 (D.C. Cir. 1988)(quoting *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974)):

> The Commission's real party-in-interest inquiry typically focuses on whether a third person "has an ownership interest, or will be in a position to actually or potentially control the operation of the station."

In its recent *Univision Holdings, Inc.*, FCC 92-445, released September 30, 1992, the Commission also generalized:

> The phrase "real party in interest" usually applies to parties to pending applications, while "*de facto*" control is normally applied to persons controlling outstanding authorizations. The concern in either context is whether an applicant or licensee is, or will be, controlled in a manner that differs from the proposal before, or approved by, the Commission. *Arnold L. Chase*, 5 FCC Rcd 1642, 1648 n.5 (1990).

Univision at n.12. Another difference is that, whereas *de facto* control requires a showing of dominance by a party not expressly reported as controlling,[52] no such dominance is required merely to find that an unnamed party has some functional proprietary interest in the application (or licensee) that is not reported as such. *See, e.g., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *Shawn Phalen*, 7 FCC Rcd 623, 625 (Rev. Bd. 1992)(father "is either *a*, or *the* real party in interest"); *see generally also Rayne Broadcasting Co., Inc.*, 5 FCC Rcd 3350 (Rev. Bd. 1990)(real-party-in-interest issues added against both competing applicants); *Richard P. Bott, II*, 4 FCC Rcd 4924, 4928-30 (Rev. Bd. 1989)(no award could be made without real-party-in-interest issue against subject applicant)(subsequent history omitted).

32. The common thread in all of these cases, and the *sine qua non* of a real-party-in-interest issue, is a showing that a party not named as a principal holds either an undisclosed ownership interest *or* the functional equivalent thereof. The regulatory sin embedded in the issue is the failure to disclose the true "owners," information the Commission must have for a panoply of administrative purposes; *e.g.*, multiple ownership rules, character concerns, alien ownership limitations, and ultimate responsibility for overall FCC licensee obligations. But again, the key ingredient to a real-party-in-interest showing is whether a party *not* identified as a principal has the ability to act as one, so that the party can effect station operations in such core areas as programming and personnel. *Cf. Letter to Messrs. Russo and Cohn, supra* note 52.

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[47] NGRI Exceptions at 14-17.

[48] RCDI Exceptions at 23.

[49] *Id.*, at 19-22.

[50] *Id.*, at 3-4(emphasis added).

[51] *Id.*, at 14-18. Here, RCDI raises a question regarding the "Daytimer preference" we have just certified to the full Commission. *See Esteban Don Lizardo & Matt Franich*, FCC 92R-75, released Sept. 23, 1992 (*corrected*) . RCDI also maintains:

> If, on remand of *Susan M. Bechtel v. FCC*, D.C. Cir. No. 91-1112, argued November 25, 1991, decided January 31, 1992, the Commission should eliminate the litmus test hurdles that have developed for testing comparative integration claims, RCDI would prevail because of its AM daytimer preference.

RCDI Exceptions at 23. This hypothetical is now moot before the Board. *See Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566 (1992).

[52] As the Commission has held:

> Generally, the principal indicia of control the Commission considers in determining whether an unauthorized transfer of control has taken place are station finances, personnel matters and programming. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981).

Letter to Messrs. Russo and Cohn, 5 FCC Rcd 7586, 7586 (M.Med.Bur. 1990).

33. By that standard, and its implementing precedent, we agree with the ALJ that no real-party-in-interest issue was warranted here. RCDI's grievance in this regard consists of a one-paragraph discharge which states[53]:

> RCDI believes that the ALJ's findings with respect to the role of Capital Radio Services, Inc. establish not only that LCLP cannot be credited with claimed integration, but also that Capital Radio Services, Inc. was a stake-holding, control-sharing real-party-in-interest when the application of LCLP was filed and until well after B cut-off. The ALJ's *Memorandum Opinion and Order*, FCC 91M-3360, released December 2, 1991, should therefore be vacated and LCLP should be held disqualified.

Not a relevant case is cited, nor does RCDI provide any further analysis in support of its stated "belief." Neither does NGRI cite or rely upon real-party-in-interest precedent to buttress its jeremiad that the ALJ erred in granting summary decision for LCLP on this issue.[54] In the main, NGRI submits that Capital must be considered, in essence, a party principal because: (1) Capital played an active role in the formation of LCLP; and (2) Capital, at least until August 12, 1989, "controlled" the finances of LCLP. We shall hold in brief abeyance our review of Capital's formational activities until we reach the question of "integration" reliability, *see infra* paras. 37-43, and focus immediately on the question of financial control as it pertains to real-party-in-interest issues.

34. As the courts have long recognized, and as noted recently by the Commission, *see supra* note 52, one of the most elementary methods by which a non-party might come to exert appreciable heft over the nominal licensee is by dominating its finances. We rehearsed that self-obvious axiom just recently in *Shawn Phalen, supra*, 7 FCC Rcd at 624-25, where we quoted *Heitmeyer v. FCC*, 95 F.2d 91, 99 (D.C. Cir. 1937):

> It is well known that one of the most powerful and effective methods of control of any business, organization, or institution . . . is the control of its finances . . .
>
> [T]he burden is and should be upon the applicant to satisfy the Commission, not only that he has financial ability to construct and operate a station, but financial ability to construct and operate it free of control, direct or indirect....

See also WLOX Broadcasting Co. v. FCC, 260 F.2d 712, 715-716 (D.C. Cir. 1958)(financial leverage can effect control). In fact, a more contemporary panel reminded the Commission of the nexus between finances and licensee control in *Astroline Communications, supra*, when it cautioned that, to the extent that the agency's underlying decision intimated that finances were "irrelevant" to real-party-in-interest examinations, "the Commission's rationale could represent a significant departure from its own precedent in this area." 857 F.2d at 1566. In *Shawn Phalen*, therefore, we found the tender applicant's father to be a real-party-in-interest because, not only was he supplying all of the financing, he outright testified that he would not hesitate to use his financial leverage to usurp his daughter's station "if push came to shove." 7 FCC Rcd at 625 (quoting father's testimony).

35. As we review the facts at bar, it is utterly unsurprising that neither NGRI nor RCDI cite a single pertinent case in support of their insistence on the disqualification of LCLP under a real-party-in-interest issue, for -- tersely put -- the shoe does not fit. First, and most obviously, the heavy financing did not here flow *from* Capital *to* the fifteen LCLP "partners"; it flowed the *other* way, with $100,000 of "partner" financing going *to* Capital. This is assuredly not stereotypical of the real-party-in-interest paradigm, but the obverse. We have considered the dispute over whether Capital held those funds in "escrow," out of which sum Capital was to pay various application processing expenses. Yet even if no formal "escrow" account was established, we fail to see how this particular arrangement could or would predict that Capital would use *its* "financial leverage" to control the operations of any nascent LCLP station. While the arrangement was no doubt lucrative to Capital, and we do not comment on the commercial wisdom of the initial arrangement (or Lowrey's pledge to pay Capital an additional $17,500 out of station profits, if any), nothing here suggests that Capital enjoyed the potential to exert significant control over *station* operations.[55] The exceptors' own intimations to the effect that the LCLP "partners" were foolish to have "overpaid" Capital for its organizational "scheme" correspondingly undercut their respective real-party-in-interest theses.

36. Second, we are not persuaded otherwise by the fact that some of Capital's principals have experience in broadcasting. If analogues are useful, we observe that in *Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984), the court found nothing amiss in the fact that a major local broadcaster not only had a strong involvement in the pre-organizational activities of an applicant, but -- at the extreme -- might provide 44% of the financing. *Compare also Univision Holdings, supra*. Although cognizant

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[53] RCDI Exceptions at 23.

[54] *See* NGRI Exceptions at 4-9.

[55] *Id.*, at 5, where NGRI carps:

> Capital had a stake in the LCLP application. If the application were successful, either through merger, settlement, or grant of LCLP's application, Capital would receive an additional $17,500.00 from Lowery [sic] to be paid out of profits of the station. (North Georgia Exhibit 19) On the other hand, if the application failed, Capital would receive only an additional $100.00 from Lowery [sic] in satisfaction of the note. (North Georgia Exhibit 19).

True, but largely irrelevant since it is black-letter law that a mere creditor is not deemed a party-in-interest. *Morris, Pierce & Pierce*, 88 FCC 2d 713, 717 (Rev. Bd. 1981), *rev. denied*, FCC 83-31, released Jan. 25, 1983. *See generally also KIST Corp.*, 102 FCC 2d 288, 290-93 (1985).

that *Cleveland Television* involved expressly reported (preferred) shareholders and that *Univision* similarly focuses on potential *de facto* control by named (alien) principals, the point we make is that in neither case was there found to be an actionable potential for undue influence or control, despite heavy financing and application involvement by the secondary parties under special scrutiny. Here, even interpreting the facts most favorably to the exceptors, we find little of the indicia associated with a real-party-in-interest problem. *Compare Shawn Phalen* and *Richard Bott, II, supra*. We affirm the ALJ on this basic determination.

37. *Ownership/Management Integration*. As indicated above, whereas the ALJ located no grounds for a real-party-in-interest finding, he nonetheless denied all "integration" credit to LCLP in light of his view that Capital's pre-organizational role, combined with its "veto" power over "reselling" of the application and its "control" of application expenses until somewhat after the "B" cut-off date, afforded Capital so much power over LCLP that LCLP failed to overcome its "burden" of demonstrating that LCLP would exercise sole dominion over the future station. *See I.D.*, paras. 85-97. Thus, and on the one hand, the ALJ held that the exceptors had proffered *no:*

> sustainable theory to support a finding of undisclosed control by Capital to the exclusion of Lowrey because there is no evidence of an agreement to transfer control. As indicated above, Capital was an agent that was contractually obligated to LCLP to arrange for and provide specified turnkey services.

Id., at para. 89. *See also id.*, at para. 93 (original emphasis; internal citation omitted), where the ALJ held:

> There is no evidence that Capital had in fact exercised any decisional control over the application. But the test applied by the Commission is whether a person "*is in a position to exercise significant control over the applicant.*"

On the other hand, the ALJ refused to grant "integration" credit to LCLP because (*id.*, at para. 97):

> Lowrey and the fourteen limited partners signed agreements with Capital which were formulated by Capital. Lowrey's Owner/Operator Agreement conceded that Capital had the right to be informed on material matters involving the progress of the application and Lowrey was obligated contractually to furnish such information. There was no termination date. Capital made decisions on expending $82,000 in venture funds that Lowrey and LCLP had entrusted to Capital by parole arrangement. Capital's unfettered control over those funds went beyond the "B" cutoff and Lowrey's obligation to report to Capital under the Owner/Operator Agreement had not terminated. Such a structuring of a contract with Capital, com[m]ingled with the absolute control over the funds needed to prosecute LCLP's application that was assumed by Capital with LCLP's consent on and after the "B" cutoff, suffice to deny LCLP any credit for Ms. Lowrey's proposed 100% integration. *See Progressive Communications, Inc.*, 5 FCC Rcd 7058-59 (Comm'n 1990)(integration proposal completely discounted because one with no formal interest was in a position to exercise significant control). Conversely stated, the burden of proof was with LCLP to establish that it had adhered at all times to its integration proposal. By ceding inchoate control power to Capital in the manner described above, LCLP has failed to meet its burden of proof. *See Cuban-American, Ltd.*, 5 FCC Rcd 3781, 3785 (Comm'n 1990).

38. The ALJ reached this negative conclusion by borrowing mightily from two discrete lines of cases he found to impact, by analogy, to the very different circumstances at bar: first, he drew from the "financial control" cases heretofore previewed (*Heitmeyer; WLOX, see I.D.*, para. 96); and, second, he extracted from the line of what were formerly termed "sham" cases, involving bogus two-tiered ownership structures.[5n] LCLP argues that the ALJ's reasoning was faulty, while its two detractors agree with the ALJ, so far as he went. Just as we determined that the real-party-in-interest shoe did not fit LCLP, we are similarly constrained to conclude (for many of the same reasons) that the "financial control" cases are inapposite here. And,

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[5n] The Commission realized, early on, that recognizing for its licensing purposes these two-tiered ownership structures held a great potential for mischief, and it declared "that in order to avoid '*sham*' arrangements, we will continue to review such agreements to ensure that complete managerial control is reposed" in the purportedly "active" principals. *Minority Ownership in Broadcasting*, 92 FCC 2d 849, 855 (1982)(emphasis added). The mischief was not long in coming. *See KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *modified* 102 FCC 2d 288 (1985), *aff'd per judgment sub nom. United American Telecasters v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986)(Table), *cert. denied*, 481 U.S. 1050 (1987), perhaps the first in a seemingly endless string of such charades. *See, e.g., Metroplex Communications, Inc.*, 4 FCC 2d 8149, 8159 (Rev. Bd. 1989)(and cases cited therein), *modified*, 5 FCC Rcd 5610 (1990), *aff'd by judgment sub nom. Southeast Florida Ltd. Partnership v. FCC*, 947 F.2d 505 (D.C. Cir. 1991). The courts, too, became quickly aware of the hijinks at the FCC. *See, e.g., Marlin Broadcasting of Central Florida., Inc. v. FCC*, 952 F.2d 507, 511 (D.C. Cir. 1992), where the court stated:

> The Commission must "'identify and eliminate from participation' those applicants who are not *bona fide*." *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3025 n.48 (1990)(quoting *Fullilove v. Klutznick*, 448 U.S. 448, 487-88 (1980)). The Commission sometimes dismisses applications as sham for integration purposes when it appears that passive or limited partners would actually control the day-to-day operations of a proposed broadcast station. *See, e.g., Royce Int'l Broadcasting*, 5 FCCR 7063 (1990), *reconsideration denied* 6 FCCR 2601 (1991)(all integration credit denied where limited partner actively participated in partnership affairs and in fact dominated partnership activities); *Doylan Forney*, 5 FCCR 5423, 5424-25 (1990) (defective integration proposal where limited partners could dissolve partnership or sell partnership assets without concurrence of general partners); *Mableton Broadcasting Co., Inc.*, 5 FCCR 6314, 6315-18 (Rev. Bd. 1990) (all integration credit denied where limited partners chose unknown black female with no broadcast exper-

that the template crafted by the Commission to filter out "sham" two-tiered applicants does not catch LCLP by its "integration" proposal.

39. It is true, as the Board just tracked in *Isis Broadcast Group*, 7 FCC Rcd 5125 (Rev. Bd. 1992), that after an apparent lacuna of several years[57] the Commission seems recently to have recalibrated its "sham" focus to include present and future financial control. In a fresh series of cases explored in *Isis*, *see* 7 FCC Rcd at 5130-34, the Commission has pointedly noted where the purportedly "passive investors" have maintained too great a degree of control over the applicant's finances, and inferred in part therefrom that the so-called "active" principals might not likely control the station. In these recent cases, control of finances by the "passive" principals, once the applicant has matured organizationally, has been considered a material indicator that actual control had not passed to the "active" counterparts (and might never pass). As one more blank in the "sham" detector template, this recent focus on financial control makes eminent good sense as yet another predictive element. Hence, in the *Isis*-cited cases, "integration" credit was often denied because it could not be foretold whether the allegedly "active" principals would maintain a control level commensurate with their (nominal) ownership shares.

40. But the Commission's adversion to "financial control" in this newer skein of cases must be read in the context intended, to wit: whether, in these two-tiered organizational structures (which are easily susceptible to gross mischief, *see Minority Ownership*, *supra* note 56), the purportedly "active" principals will have actual control. In cases exemplified by *Evergreen Broadcasting Co.*, *supra*, and *Coast TV*, 5 FCC Rcd 2751 (1990), the Commission has sought to clarify that *any* post-formational activity by "passive investors" will "undermine[ ] our confidence that it will observe the active-passive distinction in the future." *Royce Int'l Broadcasting*, 5 FCC Rcd 7063, 7064 (1990)(subsequent history omitted). In that vein, and as *one* indicator of a porous two-tiered structure, post-organizational control of finances by the "passive" financiers is of a fitting piece in the Commission's "sham" detector template.[58]

41. But comparing the facts here with those discussed in *Fresno FM Limited Partnership*, *supra* note 58, the ALJ was compelled to exclaim that "Lowrey was not a front for Capital in the tradition of the typical 'sham'." *I.D.*, at para. 88. That is manifest; and while we quite agree that post-organizational control of finances is a valid indicator when "active"/"passive" demarcations are treated lightly by two-tiered applicants, so much so that hugely extrapolated "integration" credit may be denied such entities, we roam somewhat afield if we attempt to apply the "sham" detector template to an entity that bears *none* of the other primary hallmarks of a "sham" two-tiered construct.

42. For it must be recalled that the Commission deploys its "sham" detector template for a *singular* purpose: to attempt to *predict*, from pre-organizational or post-organizational activities by "passive investors," whether such investors will remain "passive" regarding *management* of the proposed station. Like the real-party-in-interest shoe that does not fit on LCLP, the "sham" detector template has little utility here where the LCLP "partners" are *themselves* the financiers and where the other pre-organizational activities of Capital are not very different from those provided by communications lawyers and engineers in any broadcast application, or by communications entrepreneurs generally.[59] All in all, we find almost totally inapposite the "sham" line of cases, and will not engraft shards of those standards here, lest in the tangled thicket of comparative case doctrine we entirely lose sight of the operative issue to be resolved: *i.e.*, whether there is sufficient record evidence to conclude that the reported owners will *not* actively manage the proposed station. That is the *only* salient inquiry.

43. The Commission's standard for accepting an integration proposal as an ultimate conclusion is as follows:

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ience to be general partner seventy-two hours before application deadline and after several other potential general partners had declined).

Nonetheless, the Commission announced that, henceforth, use of the term "sham" should be avoided. *Evansville Skywave, Inc.*, 7 FCC Rcd 1699, 1700 (1992). *But see R.J. Winter, Inc.*, 7 FCC Rcd 2235, 2236 (1992) (referencing the Commission's "ongoing efforts to discourage the filing of sham or abusive applications"). Because the pleadings in this case may not have fully comprehended *Evansville Skywave*, and *passim* invoke the term "sham" with regard to LCLP, the Board will use the term in this text for simplicity and consistency.

[57] The apparent diminution of the Commission's interest in applicant financing when the applicant has a *two-tiered* ("active"/"passive") ownership structure is tied, naturally, to the fact that financing is the *raison d'etre* for "passive investors" in the first instance; in principle, "passive investors" have no other perceptible function. *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984); *see also Cleveland Television*, *supra*. Indeed, in *KIST Corp.*, the premier "sham" adjudication, the Board denied "integration" credit to both applicants, but the Commission reversed as to the second applicant notwithstanding what the Board considered absolute financial control by the partner who did not intend to "integrate" full-time. *See* 102 FCC 2d at 290-93. The Commission's apparent disinterest in potential financial leverage by "passive investors" reached its zenith, perhaps, in *Doylan Forney*, where the Commission went so far as to state: "There is no mention of any question about control of the applicant in the cited opinion in *Heitmeyer v. FCC*, 95 F.2d 91 (D.C. Cir. 1937)." 5 FCC Rcd at 5427. More recently, however, in the cases cited in *Isis Broadcast Group*, *supra*, the Commission has begun to note adversely where the "passive investors" have maintained too taut a leash on financing, *after* the subject applicant has reached organizational maturity. *See* 7 FCC Rcd at 5130-34.

[58] In what were formerly termed "sham" cases (*see supra* note 56), the prototypical format included (1) allegedly "passive investors" owning the lion's share of equity who used their own lawyers, engineers, *etc.*, combined with (2) an unfamiliar recruit who, for no discernable consideration, was handed a token equity share (anywhere from 4% to 25%) to pose as the *sole* controlling voting shareholder or solitary "general" partner. The only conceivable purpose of such inherently incredible constructs was to (3) exaggerate the qualitative comparative attributes of the frontperson, while (4) shielding the allegedly "passive" owners from any comparative disadvantages, including other media interests, distant residences, as well as race and gender. *See Fresno FM Ltd. Partnership*, 6 FCC Rcd 6998 (1991)(and prototypical "sham" cases cited at para. 6 therein) (subsequent history omitted).

[59] In that connection, the Commission has many times held that a potential broadcast "owner might have reason to depend heavily on expert advice." *Fresno FM*, 6 FCC Rcd at 7001 n.6.

> Integration credit is due when the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out.

Coast TV, 5 FCC Rcd at 2752 (citing *Bradley, Hand Triplett*, 89 FCC 2d 657, 662 (Rev. Bd. 1982)). On the facts before us, we agree with the ALJ that LCLP is not a "sham" applicant, *I.D.*, para. 88; we further agree that there is no "sustainable theory to support a finding of undisclosed control by Capital to the exclusion of Lowrey . . ." *id.*, at para. 89; and we further agree that "[t]here is no evidence that Capital had in fact exercised any decisional control over the application." *Id.*, at para. 93. Where we depart, as we have explicated in detail, is in the attempt by NGRI and RCDI to support the *I.D.'s* extension of the "financial control" facet of real-party-in-interest and "sham" cases to this unrelated setting, where the "turnkey" organizer held the so-called "escrow" account until after the "B" cut-off date. So far as legally relevant, Capital's posture was the same both before and, for a time, after the "B" cut-off date; its money was secure (at least up to $82,500) throughout -- win, lose or draw by LCLP. It had relatively little interest, as in the mainline "sham" cases, in falsely skewing LCLP's comparative profile so as to shield the *true controlling principals* from adverse comparative consequences. In proper and realistic context, we find Capital's actions *de minimis* and demurrable insofar as the question of the reliability of LCLP's "integration" proposal.[60] We will not attempt to force this instant square peg into the round hole of unrelated precedent, and shall therefore grant LCLP's exceptions. We find nothing on this score upon which to deny LCLP 100% quantitative "integration" credit.[61]

COMPARATIVE ANALYSIS

North Georgia Radio II, Inc.

44. The 100% quantitative "integration" credit accorded to LCLP is enhanced by Lowrey's lifetime residence in Dalton, interrupted by a seven-year absence ending in 1974, and thirteen years of continuing involvement in local civic activities. *Id.*, paras. 25-28, 107. The relative weight of LCLP's comparative proposal is, as the ALJ noted, greater than that of NGRI; NGRI's Wortsman has resided in Dalton since 1960, but his civic involvement is of lesser magnitude than Lowrey's, and more remote in time. *Compare I.D.*, paras. 37-39 *with id.*, paras. 26-29. *See generally Bible Broadcasting Network, Inc.*, 7 FCC Rcd 432, 435 (Rev. Bd. applicant with greater and continuous civic involvement in a wider range of activities preferred over applicant with longer residence), *rev. denied*, 7 FCC Rcd 4578 (1992); *Scottsdale Talking Machine and Wireless Co., Inc.*, 6 FCC Rcd 7539 (Rev. Bd. 1991)(same), *rev. denied*, 7 FCC Rcd 4422 (1992). We thus accord with the *I.D.'s* "contingent" comparative analysis, *I.D.*, para. 107, and find that LCLP's stronger showing under the combined residence/civic activity criterion outweighs the credit NGRI receives for Wortsman's substantial broadcast experience. *See, e.g., Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485, 4485 (1991) ("[b]roadcast experience has always been deemed of less importance than other enhancing factors under the integration criterion"), citing *Policy Statement*, 1 FCC 2d at

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[60] Not to the contrary is *Saltaire Communications, Inc.*, 7 FCC Rcd 5164 (Rev. Bd. 1992). There a group of three associates recruited one associate's daughter as the "sole" voting stockholder. They originally considered becoming principals by holding nonvoting stock and serving as directors, but later changed their minds when advised that their roles would adversely affect the applicant's integration credit. (Nonetheless, a 1990 corporate report filed with the state listed them as officers or directors.) The three (Hamilton, Spicer, and Levin, hence "WHSL") then cut themselves "participating notes" to retain the same participation in equity as originally intended. 7 FCC Rcd at 5167. Those notes, which could not be paid off at the "voting" stockholder's discretion, contained some very telling provisions:

> Section (d) of the notes provides that, except with the consent of the holders of at least two-thirds in amount of the outstanding participating notes, given in person or by proxy at a meeting of the stockholders, WHSL cannot, *inter alia:* (1) amend or repeal any provision of the Certificate of Incorporation if such action would alter the preferences or special rights of the participating notes so as to affect them adversely; (2) issue, authorize, or create, or increase the authorized amount of, any stock, security, debt or obligation having preferential rights to the earnings or assets; (3) by voluntary action dissolve, liquidate, or wind up WHSL or sell, mortgage, pledge, lease, or convey all or substantially all of the assets of WHSL; or (4) effect the merger or consolidation of WHSL. *Id.*, at 3-4. Section (d) can only be amended, repealed, or added to by consent of holders of three-fourths in the amount of the notes given in person or by proxy at a shareholders meeting. *Id.*, at 5.

7 FCC Rcd at 5166. Moreover, the purportedly sole "active" principal (Hamilton's daughter) confessed that she "was very confused about 'the whole process' concerning WHSL's finances." *Id.*, at 5167. Under all of the particular circumstances there, the WHSL "notes" were treated as if equity, and 100% "integration" credit denied the daughter. While the exceptors here point out that the Capital service contract boilerplate required Lowrey to provide it with information on LCLP's "legal, technical, managerial, financial and other qualification[s]," *see I.D.*, para. 95 ("no evidence of that provision being complied with") and proscribed the "reselling" of the application (a nullity) without Capital's permission, *see* NGRI Exh. 18 at 2, this is a far cry from *Saltaire* and certainly does not *predict* that LCLP would not have exclusive control over its proposed *station*.

[61] The exceptors also claim that Lowrey puffed her role as LCLP's promoter in assembling the fourteen "limited" partners, *see, e.g.*, NGRI Exceptions at 9-14. But recent precedent holds that, *even if* such puffery had occurred here, no absolute disqualification is warranted. *Evansville Skywave, supra*, 7 FCC Rcd at 1701 (Comm'n recognizes that putative "general" partner "exaggerated" organizational role). As to NGRI's plaint that the ALJ erred in failing to afford it cross-examination on the requested issues on which the ALJ granted summary decision, *see* NGRI Exceptions at 6-7, we incorporate our recent discussion in *Radio Lake Geneva Corp.*, 7 FCC Rcd 5586, 5591-92 (Rev. Bd. 1992), and find no abuse of discretion here.

396.[62] Because we find that LCLP prevails over NGRI on comparative grounds, we need not formally reach the remaining exceptions relating to NGRI. *See* NGRI Exceptions at 21-23; RCDI Exceptions at 19-22.

Radio Center Dalton, Inc.

45. Although we do not here formally decide whether, and to what extent, Watts' and Means' continuing responsibilities for WLSQ(AM) impact on their ability to effectuate their FM "integration" proposals, *see supra* note 51, we volunteer nevertheless our firm view that RCDI merits decisively less than 100% credit. RCDI contends that Watts now works 70-hour weeks, including 26 hours on WLSQ(AM) business in addition to the 24.5 hours on his *non-broadcast* business endeavors, "leaving in excess of 40 hours a week to devote to fulfilling his [proposed FM] commitment."[63] But where an applicant principal retains significant outside business interests, it "must set forth a specific and credible plan explaining how the principal in question would arrange for the businesses to be managed while fulfilling his integration commitment." *Kevin Potter*, 7 FCC Rcd 4342, 4342 (1992), citing *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969). Watts' numbers do not add up and his breezy dispatch of his other income-producing commitments falls far short of the required showing.[64]

CONCLUSION

46. The dispositive question in this case, which we have answered in the affirmative, is whether LCLP should be awarded its basic "integration" credit, from which currently flows any and all qualitative comparative extras.[65] In reversing the *I.D.* on this decisional point, we have necessarily had to consider, again, questions concerning the role of a promoter, this time Capital. How these entities are regarded seems frequently to depend on one's point of view: in the pejorative these are "application mills"; to others these are "entrepreneurs," "promoters," "brokers" or "consultants." The Board's view here is largely neutral, for we do not sit to license middlemen. Our *purview* is primal: Is the applicant that emerges from the application process *bona fide;* is it basically qualified; is it comparatively superior?

47. LCLP's opponents seek to exenterate Lowrey and her "limited" partners for their association with Capital on two grounds. NGRI asserts that LCLP is the product of a "scheme" by Capital, two of whose principals "had previously been associated with the infamous application mill Sonrise Management Services, Inc. . . ."[66] But our analysis must be laid on a more dispassionate plane, and we do not practice guilt by association in our review functions. *See, e.g., Georgia Public Telecommunications Comm'n*, 7 FCC Rcd 2942 (Rev. Bd. 1992)(Sonrise-spawned applicant awarded permit); *Utah Television Associates Limited Partnership*, 102 FCC 2d 1470, 1472-74 (Rev. Bd. 1985)(applicant associated with Sterling Communications, Inc. awarded permit).

48. The second ground upon which NGRI and RCDI stand, whereupon the *I.D.* is also planted, is muddied by an attempt to cover too wide a field with too little turf. Neither real-party-in-interest nor "sham" doctrine have roots that entangle the LCLP stalk. We find no solid basis in the record evidence from which to infer logically that Capital is a party principal or that it holds, or held, the potential to influence or control *station* management. Nor does the fact that Capital extracted a good deal of money for its services, or might receive a $17,500 bonus, alter our fundamental conviction. Almost all applicants rely, to a greater or lesser degree, upon legal and technical experts in application preparation. *Fresno FM, supra* note 59. And the hypothetical right to a share of any initial profits is, standing alone or upon these facts, unremarkable. Even if we considered Capital a "creditor" in this minor regard, we see no likelihood of outside control through financial leverage. As the *Doylan Forney* Commission observed:

> In *WLOX Broadcasting Co. v. FCC*, 260 F.2d 712 (D.C. Cir. 1958), the court decided that a lender was a principal for purposes of integration analysis because the terms of the credit arrangement empowered him to manage the applicant's business and virtually ensured that he would acquire a majority of the shares of voting stock within two years.

5 FCC Rcd at 5427. Nothing here ties (or tied) LCLP and Capital in such a way. After reviewing the facts of record, at somewhat exorbitant length, we still find no legal basis or rational basis upon which to disqualify LCLP or to withhold its "integration" credit.

49. For reasons also set out above, we agree with the ALJ that little "integration" credit can be awarded to RCDI. *See also supra* notes 51 and 64. And, even if we accorded NGRI a 100% quantitative "integration" credit, it falls short of LCLP's Lowrey on qualitative attributes. While we do not find LCLP's comparative edge over NGRI to be as "clear," perhaps, as the ALJ, *I.D.*, para. 107, her local residence and civic activities are sufficiently stronger so that, under precedent, she must be seen to prevail. *See, e.g., Rebecca L. Boedker*, 6 FCC Rcd 2557 (1991), *aff'd per judgment*, No.

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[62] As held *supra* note 46, LCLP receives no additional credit for Lowrey's gender.

[63] RCDI Exceptions at 3-4, 14-15.

[64] Moreover, although not raised by the parties or the *I.D.*, we note that the Board would not cede RCDI more than 50% credit, in any event, due to its structure wherein stockholders own shares of both "voting" and "non-voting" stock. As we recently reiterated:

> Because [the stockholders] own shares of both voting and nonvoting stock, it is not possible to separate their commingled active and passive ownership interests for purposes of the Commission's insulation requirements. *See Cotton [Broadcasting Co.]*, 4 FCC Rcd at 1782; *Sorenson*, 6 FCC Rcd at 6901. Thus, the total interests of each stockholder owning both voting and nonvoting shares must be attributed.

William E. Fitts, 7 FCC Rcd 4909, 4910 (Rev. Bd. 1992).

[65] *See Anchor Broadcasting, supra* note 51 ("integration" criterion to be applied as in past to current cases, despite outstanding inquiry precipitated by court remand).

[66] NGRI Exceptions at 11. *See Order*, 4 FCC Rcd 6342(1989)(Comm'n initiates investigation of Sonrise).

91-1277 (D.C. Cir. April 24, 1992); *Colonial Communications, Inc.*, 6 FCC 2296 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992).

50. ACCORDINGLY, IT IS ORDERED, That the application of Lowrey Communications, L.P. (File No. BPH-881026MC) for a construction permit for a new FM station at Dalton, Georgia, IS GRANTED; and that the applications of North Georgia Radio II, Inc. (File No. BPH-881026MD) and Radio Center Dalton, Inc. (File No. BPH-881026MK) ARE DENIED.[67]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

[67] We also deny, due to insufficient grounds presented, LCLP's request for oral argument and RCDI's petition for leave to supplement exceptions.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Subpart S and T of
Part 90 of the Rules to
Permit Licensing of Channels
in the 896-901/935-940 MHz and
220-222 MHz Bands in the
U.S./Mexico Border Area

ORDER

Adopted: October 28, 1992; Released: November 4, 1992

By the Chief, Private Radio Bureau:

1. On July 24, 1986, the Commission allocated ten megahertz of spectrum in the 896-901 MHz and 935-940 MHz bands for use in the Private Land Mobile Radio Services.[1] The Commission subsequently issued a Public Notice on November 4, 1986, that established filing procedures for this private land mobile spectrum.[2] In that Public Notice, the filing of applications for channels in the Business and Industrial/Land Transportation pools[3] was restricted to systems to be located at least 68.4 miles (110 kilometers) from the United States/Mexico border. Although the Commission accepted applications for channels in the SMR pool in the Mexican border area, it stated that no license grants would be made for applications in border areas pending further discussion with Mexico.

2. On August 11, 1992, the Commission and the Mexican Secretariat of Communications and Transport finalized a Memorandum of Understanding (MOU) concerning use of the 896-901/935-940 MHz bands in the vicinity of the United States/Mexico border.[4] The signing of this MOU clears the way for licensing of these bands in the border area on or after the entry-into-force date of the MOU, June 11, 1993. The MOU calls for sharing of these bands along the border, with channels being equally divided for use by each country. The United States will have primary access to 200 channels in the frequency bands 896.000 to 898.50625 MHz and 935.000 to 937.50625 MHz within 110 kilometers (68.4 miles) of the U.S./Mexican border, subject to effective radiated power and antenna height limits. In addition, channels allotted for primary Mexican use may be assigned to U.S. licensees on a secondary, non-interference basis, with the maximum power flux density (pfd) at any point at or beyond the border not to exceed -107 dB(W/m^2). In this Order, we are incorporating the operative elements of this MOU into Part 90 of our Rules.

3. On March 14, 1991, the Commission adopted a Report and Order establishing service rules to provide for the use of the 220-222 MHz band by private land mobile radio services.[5] In a subsequent Memorandum Opinion and Order, adopted June 18, 1992, the Commission further noted that use of the 220-222 MHz frequencies in the Canadian and Mexican border areas will be subject to coordination with these countries.[6]

4. On August 11, 1992, the Commission, the U.S. Department of State, and the National Telecommunications and Information Administration finalized with the Mexican Secretariat of Communications and Transport an Agreement concerning the use of 220-222 MHz bands for operating land mobile radio stations along their common border.[7] The Agreement calls for Mexico having primary access to 97 channels and the United States having primary access to 97 channels in the frequency band 220-222 MHz within 120 kilometers of the border, subject to effective radiated power and antenna height limits. In addition, channels allotted for primary Mexican use may be assigned to U.S. licensees on a secondary, non-interference basis with the maximum power flux density (pfd) at any point at or beyond the border not to exceed -86 dB(W/m^2). In this Order, we are incorporating the operative elements of this Agreement into Part 90 of our Rules.

5. These rule changes will facilitate the construction of additional Private Land Mobile Radio stations in the Mexican border area. This should result in improved mobile communication service to the public without adversely affecting any party. As this *Order* does not impose new rules on licensees that would adversely affect their substantive rights, we find that notice and comment procedures are neither necessary nor appropriate.[8] To initiate a notice and comment procedure to make these additional channels available for licensing in the Mexican border area would significantly delay the use of these channels without any countervailing public interest benefit. Further, because the rule changes relieve a restriction, we also conclude that these changes should become effective immediately upon publication in the Federal Register.[9]

6. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, 5 U.S.C. §§ 553(b)(3)(B) and (d)(1), and Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, that

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[1] Report and Order, Gen. Docket Nos. 84-1231, 84-1233, and 84-1234, 61 RR2d 165 (1986).

[2] Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd 543 (1986).

[3] Of the 399 channels included in the allocation to the Private Land Mobile Radio Services, 100 channels were allotted to the Business pool, 99 channels to the Industrial/Land Transportation pool, and 200 channels to the SMR pool.

[4] Public Notice, United States and Mexico Sign Agreement Concerning the Use of the 896-901/935-940 MHz Bands in the Vicinity of the United States and Mexican Border, DA 92-1378, October 6, 1992.

[5] Report and Order, PR Docket No. 89-552, 6 FCC Rcd 2356 (1991).

[6] Memorandum Opinion and Order, PR Docket No. 89-552, 7 FCC Rcd 4484 (1992).

[7] Public Notice, United States and Mexico Sign Agreement Concerning Use of the 220-222 MHz Frequency Band Within a Distance of 120 Km. on Each Side of the Common Border, DA 92-1377, October 6, 1992.

[8] *See* 5 U.S.C. § 553(b)(3)(B).

[9] *See* 5 U.S.C § 553(d)(1).

effective (INSERT FR Pub. DATE), Part 90 of the Commission's Rules is amended as set forth in the attached Appendix.

7. IT IS FURTHER ORDERED that, because these amendments eliminate restrictions on the use of spectrum in the Mexican border area, this *Order* is effective immediately upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Acting Chief, Private Radio Bureau

APPENDIX

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.555 is amended by revising paragraph (b) to add the frequency bands 896-901 MHz and 935-940 MHz to the Combined Frequency List numerically to read as follows:

§ 90.555 Combined Frequency Listing

* * * * *

(b) Combined frequency list

Frequency	Services	Special Limitations
* * * * *		
MEGAHERTZ		
* * * * *		
896 to 901	All Svcs	Mobile
* * * * *		
935 to 940	All Svcs	Base or Mobile
* * * * *		

3. Section 90.619 is amended by revising paragraphs (a), (a)(2), (a)(3), (a)(4), by revising the caption for Table 1C, by revising the title of Table 2 to read Table 2A and revising the caption, by revising the title of Table 3 to read Table 3A and revising the caption, by revising the title of Table 4 to read Table 4A and revising the caption, and by creating new Tables 2B, 3B and 4B to read as follows:

§ 90.619 Frequencies available for use in the U.S./Mexico and U.S./Canada border areas.

(a) U.S./Mexico border area. The channels listed in Tables 1A, 2A, 3A and 4A are offset 12.5 kHz lower in frequency than those specified in the 806-821/851-866 MHz Table in § 90.613. The Channel 201 base frequency will be 856.000 MHz, followed by Channel 202 at 856.025 MHz and proceeding with uniform 25 kHz channeling to Channel 400 at 860.975 MHz. Mobile station frequencies will be 45 MHz lower in frequency. These channels are available for assignment for conventional or trunked systems only in areas 110 kilometers (68.4 miles) or less from the U.S./Mexico border. Stations located on Mt. Lemmon, serving the Tucson, AZ area, will only be authorized offset frequencies. The channels listed in Tables 2B, 3B, and 4B correspond to those specified in the 896-901/935-940 MHz Table in § 90.613 and are not offset. Mobile station frequencies will be 39 MHz lower in frequency. The frequencies listed in Tables 2B, 3B, and 4B are not available for licensing in the U.S./Mexico border area until June 11, 1993.

* * * * *

(a)(2) Certain channels in the 821-824/866-869 MHz band are also available to eligible applicants in the Public Safety Category in areas within 110 kilometers (68.4 miles) of the U.S./Mexico border. These channels will be assigned according to the policies defined in the Report and Order of Gen. Docket No. 87-112 (See §§ 90.16 and 90.34). The following channels are available only for mutual aid purposes as defined in Gen. Docket No. 87-112: channels 601, 639, 677, 715, and 753. Certain channels in the 896-901/935-940 MHz band are also available in areas within 110 kilometers (68.4 miles) of the U.S./Mexico border. The specific channels that are available for licensing in the bands 821-824/866-869 and 896-901/935-940 MHz within 110 kilometers (68.4 miles) of the Mexico border are listed in Tables 1B, 2B, 3B, and 4B and are subject to Effective Radiated Power (ERP) and Antenna Height limitations as indicated in Table 1C. In addition, all channels designated for use within Mexico in the 821-824/866-869 MHz and 896-901/935-940 MHz bands are available for assignment to U.S. stations within 110 kilometers (68.4 miles) of the Mexico border if the maximum power flux density (pfd) of the station's transmitted signal at any point at or beyond the border does not exceed -107 dB(W/m^2). The spreading loss must be calculated using the free space formula taking into account any antenna discrimination in the direction of the border. Authorizations for stations using channels allotted to Mexico on a primary basis will be secondary to Mexican operations and conditioned to require that licensees take immediate action to eliminate any harmful interference resulting from the station's transmitted signal exceeding -107 dB(W/m^2).

* * * * *

TABLE 1C -- LIMITS OF EFFECTIVE RADIATED POWER (ERP) CORRESPONDING TO ANTENNA HEIGHTS OF BASE STATIONS IN THE 821-824/866-869 MHZ AND 896-901/935-940 MHZ BANDS WITHIN 110 KILOMETERS (68.4 MILES) OF THE MEXICAN BORDER

* * * * *

(a)(3) Tables 2A and 2B list the channels that are available for assignment to eligible applicants in the Industrial/Land Transportation Category. (consisting of the Power, Petroleum, Forest Products, Video Production, Relay Press, Special Industrial, Manufacturers, Telephone Maintenance, Motor Carrier, Railroad, Taxicab and Automobile Emergency Radio Services). Specialized Mobile Radio Systems (SMRS) will not be authorized in this category except as indicated in § 90.621(g).

TABLE 2A - UNITED STATES/MEXICO BORDER AREA, INDUSTRIAL/LAND TRANSPORTATION CATEGORY 806-821/851-866 MHZ BAND (60 CHANNELS):

* * * * *

TABLE 2B - UNITED STATES/MEXICO BORDER AREA, INDUSTRIAL/LAND TRANSPORTATION CATEGORY 896-901/935-940 MHZ BAND (99 CHANNELS):

For multichannel systems, channels may be grouped vertically or horizontally as they appear in the table. Channels numbered above 200 may be used only subject to the power flux density limits stated in paragraph (a)(2) of this section:

Channel Nos.
31-32-33-34-35
36-37-38-39-40
71-72-73-74-75
76-77-78-79-80
111-112-113-114-115
116-117-118-119-120
151-152-153-154-155
156-157-158-159-160
191-192-193-194-195
196-197-198-199-200
231-232-233-234-235
236-237-238-239-240
271-272-273-274-275
276-277-278-279-280
311-312-313-314-315
316-317-318-319-320
351-352-353-354-355
356-357-358-359-360
391-392-393-394-395
396-397-398-399

(a)(4) Tables 3A and 3B list the channels that are available for assignment to eligible applicants in the Business Radio Category. This category does not include Specialized Mobile Radio Systems as defined in § 90.603(c). These channels are available for inter-category sharing as indicated in § 90.621(g).

TABLE 3A - UNITED STATES/MEXICO BORDER AREA, BUSINESS CATEGORY 806-821/851-866 MHZ BANDS (60 CHANNELS)

* * * * *

TABLE 3B - UNITED STATES/MEXICO BORDER AREA, BUSINESS CATEGORY 896-901/935-940 MHZ BAND (100 CHANNELS):

For multichannel systems, channels may be grouped vertically or horizontally as they appear in the table. Channels numbered above 200 may be used only subject to the power flux density limits stated in paragraph (a)(2) of this section:

Channel Nos.
11-12-13-14-15
16-17-18-19-20
51-52-53-54-55
56-57-58-59-60
91-92-93-94-95
96-97-98-99-100
131-132-133-134-135
136-137-138-139-140
171-172-173-174-175
176-177-178-179-180
211-212-213-214-215
216-217-218-219-220
251-252-253-254-255
256-257-258-259-260
291-292-293-294-295
296-297-298-299-300
331-332-333-334-335
336-337-338-339-340
371-372-373-374-375
376-377-378-379-380

(a)(5) Tables 4A and 4B list the channels that are available for assignment for the SMRS Category (consisting of Specialized Mobile Radio Systems (SMRS) as defined in § 90.603(c)). These channels are available for inter-category sharing as indicated in § 90.621(g).

TABLE 4A - UNITED STATES-MEXICO BORDER AREA, SMRS CATEGORY 806-821/851-866 MHZ BAND (95 CHANNELS):

* * * * *

TABLE 4B - UNITED STATES-MEXICO BORDER AREA, SMR CATEGORY 896-901/935-940 MHZ BAND (200 CHANNELS):

Channels numbered above 200 may be used only subject to the power flux density limits at or beyond the Mexican border stated in paragraph (a)(2) of this section:

Group No.	Channel Nos.
1	1-2-3-4-5-6-7-8-9-10
21	21-22-23-24-25-26-27-28-29-30
41	41-42-43-44-45-46-47-48-49-50
61	61-62-63-64-65-66-67-68-69-70
81	81-82-83-84-85-86-87-88-89-90
101	101-102-103-104-105-106-107-108-109-110
121	121-122-123-124-125-126-127-128-129-130
141	141-142-143-144-145-146-147-148-149-150
161	161-162-163-164-165-166-167-168-169-170
181	181-182-183-184-185-186-187-188-189-190
201	201-202-203-204-205-206-207-208-209-210
221	221-222-223-224-225-226-227-228-229-230
241	241-242-243-244-245-246-247-248-249-250
261	261-262-263-264-265-266-267-268-269-270
281	281-282-283-284-285-286-287-288-289-290
301	301-302-303-304-305-306-307-308-309-310
321	321-322-323-324-325-326-327-328-329-330
341	341-342-343-344-345-346-347-348-349-350
361	361-362-363-364-365-366-367-368-369-370
381	381-382-383-384-385-386-387-388-389-390

* * * * *

4. Section 90.715 is amended by adding a sentence to the end of paragraph (a) and adding a new paragraph (c) to read as follows:

§ 90.715 Frequencies available.

(a) * * * Use of these frequencies in the Mexican and Canadian border areas is subject to coordination with those countries. See paragraph (c) of this section for special provisions concerning use in the Mexico border area.

* * * * *

(c) U.S./Mexico border area.

(1) Channels 16-30, 46-60, 76-90, 106-120, 136-145, 156-165, 178-194 are available for primary use within the United States within 120 km (74.6 mi) of the Mexican border, subject to the power and antenna height conditions specified in § 90.729 and the use restrictions specified in §§ 90.717-90.721.

(2) Channels 195-200 are available to both the United States and Mexico in the border area on an unprotected basis. Use is limited to a maximum effective radiated power (ERP) of 2 watts and a maximum antenna height of 6.1 meters (20 ft) above ground.

(3) Channels allotted for primary Mexican use (1-15, 31-45, 61-75, 91-105, 121-135, 146-155, and 166-177) may be used in the border area subject to the condition that the power flux density not exceed -86 dB(W/m^2) at or beyond any point on the border. Stations operating under this provision will be considered secondary and will not be granted protection from harmful interference from stations that have primary use of the frequencies.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suspension of
Section 73.682(a)(21)(iv) of the
Commission's Rules to Permit
Additional Use of Line 19 of the
TV Vertical Blanking Interval.

ORDER

Adopted: October 22, 1992; Released: November 4, 1992

By the Commission:

1. Currently, line 19 of the vertical blanking interval of NTSC television signals is reserved for the transmission of the Vertical Interval Reference (VIR) signal.[1] It appears that current use of line 19 for the VIR signal, however, is insufficient to justify the continued restriction of line 19 to that singular use. This is especially true in light of recent advances in television broadcast technology which could provide substantial improvements in the quality of television signals, but which might be delayed or foreclosed by continuing restrictions on the use of line 19. Accordingly, by this *Order* we suspend enforcement of restrictions on the use of line 19 pending action in a future rule making proceeding to codify appropriate changes.

2. While VIR provisions were adopted by the Commission in 1974 to facilitate automatic color adjustments in TV receivers, effective implementation of the VIR signal within the broadcast and receiver manufacturing industries did not occur to the extent that cognizable benefits were provided to consumers. This was due largely to advances made in chroma circuitry based on the regular color burst signal. The United States Advanced Television Systems Committee (ATSC), in a *Request for General Waiver* (*Request*) filed June 26, 1992, states that only one manufacturer, General Electric, produced any significant quantity of VIR-equipped receivers and that such production ceased in 1985. We believe that few such receivers remain in use and that they are capable of continued operation in the absence of the VIR signal. Further reservation of line 19 for VIR signals thus represents inefficient use of vertical blanking interval spectrum.

3. Moreover, while many advances in NTSC television quality have been made over the years, picture degradation through "ghosting" is probably the most significant reception defect yet to be eliminated or at least minimized. Extensive over-the-air testing of ghost-cancelling systems, as intended by ATSC,[2] would thus be in the public interest. Such testing would also serve to identify any incompatibility between ghost-cancelling reference signals and TV receivers that are equipped to receive VIR signals on the same line. There may be other unidentified uses for line 19 which could benefit by having access to line 19 and which have not been brought to our attention due to the reservation of line 19 for VIR. Therefore, we will temporarily suspend enforcement of Section 73.682(a)(21)(iv) so that line 19 can be used for any purpose and in any manner consistent with our regulation of uses of the vertical blanking interval (47 CFR 73.682(1)(21)) subject to the condition that such use does not interfere with the proper operation of television receivers. Because line 19 is essentially "vacant" we believe it is in the public interest to take this approach rather than to require interested parties and the Commission to face the delays and administrative burdens attendant on case-by-case waivers.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, that effective [upon publication of this *Order* in the Federal Register], enforcement of Section 73.682(a)(21)(iv) of the Commission's Rules IS SUSPENDED until a final decision on the most appropriate use of line 19 can be resolved in a future rule making.[3] We find for good cause that notice and comment procedures are unnecessary prior to this suspension action, because the rule's suspension is necessary to permit experimentation with, and to gather information relating to, alternative uses of line 19, will not have any adverse impact, and will permit more efficient use of the vertical blanking interval.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] The current U.S. television system is referred to as NTSC, named for the National Television Systems Committee. The vertical blanking interval is the period of time between fields of picture information in the NTSC system.

[2] *See Request* at 7.

[3] Because this suspension action relieves a restriction, it will be made effective without 30 days prior public notice.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-233

In the Matter of

Amendment of Section 73.202(b), RM-8078
Table of Allotments,
FM Broadcast Stations.
(Campbellsville and
Mannsville, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 25, 1992; Released: November 5, 1992

Comment Date: December 28, 1992
Reply Comment Date: January 12, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed on behalf of Patricia Rogers ("petitioner"), permittee of Station WVLC(FM), Channel 260A, Campbellsville, Kentucky, requesting the substitution of Channel 260C3 for Channel 260A and the reallotment of Channel 260C3 from Campbellsville, Kentucky to Mannsville, Kentucky, and the modification of its construction permit to specify Mannsville, Kentucky, as its community of license. Petitioner states its intention to apply for the channel, if allotted.

2. Petitioner states that although Mannsville is an unincorporated community, it is a Census Designated Place with a 1990 U.S. Census population of 2,145 persons. Petitioner states that the community of Mannsville has a U.S. Post Office, four churches, a Mannsville Sash and Door Company, an elementary school and numerous other clubs and organizations.

3. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *re con. granted in part*, 5 FCC Rcd 7094 (1990). Petitioner states that Mannsville would receive its first local aural transmission service and Campbellsville (population 9,577) will continue to receive local aural transmission service from Stations WTCO(AM) and WCKQ(FM).

4. We believe the public interest may be served by the proposed reallotment of Channel 260C3 from Campbellsville, Kentucky to Mannsville, Kentucky, since it would provide Mannsville with its first local aural transmission service and permit Station WVLC(FM) to expand its service area. Channel 260C3 can be allotted to Mannsville, Kentucky, in compliance with the Commission's minimum distance separation requirements at petitioner's proposed transmitter site 21.4 kilometers (13.3 miles) south,[1] in order to avoid a short-spacing to Station WDJX(FM), Channel 259B, Louisville, Kentucky.

5. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Campbellsville, Kentucky	260A, 281C3	281C3
Mannsville, Kentucky	--	260C3

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 28, 1992,** and reply comments on or before **January 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerrold Miller
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Attorney for Patricia A. Rogers)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Com-

[1] The coordinates for Channel 260C3 at Mannsville are North Latitude 37-11-00 and West Longitude 85-08-33.

mission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-83

In the Matter of

Amendment of Section 73.202(b), RM-7946
Table of Allotments,
FM Broadcast Stations.
(Jewett, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 5, 1992; Released: November 5, 1992

By the Chief, Allocations Branch:

1. At the request of Alexander Kmeta ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 2403 (1992), proposing the allotment of Channel 250A to Jewett, New York, as the community's first local aural transmission service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 250A to Jewett since an interest has been expressed in providing the community with its first local FM service. Channel 250A can be allotted to Jewett in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.9 kilometers (4.3 miles) north to avoid short-spacings to Stations WCZX, Channel 249A, Hyde Park, New York, and WSKQ-FM, Channel 250B, New York, New York.[1] Canadian concurrence in the allotment has been received since Jewett is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 21, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Jewett, New York	250A

4. The window period for filing applications will open on **December 22, 1992,** and close on **January 21, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 250A at Jewett are North Latitude 42-19-56 and West Longitude 74-18-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-45

In the Matter of

Amendment of Section 73.202(b), RM-7918
Table of Allotments,
FM Broadcast Stations.
(Fargo, North Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 5, 1992; Released: November 5, 1992

By the Chief, Allocations Branch:

1. At the request of Northwestern College ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 1909 (1992), proposing the substitution of Channel 250C for Channel 250C1 at Fargo, North Dakota, and the modification of Station KFNW-FM's license to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 250C for Channel 250C1 at Fargo since it could provide the community with an additional wide coverage area FM service and enable Station KFNW-FM to expand its service area. Channel 250C can be allotted to Fargo in compliance with the Commission's minimum distance separation requirements with a site restriction of 33.8 kilometers (21 miles) west to accommodate petitioner's desired transmitter site.[1] Canadian concurrence in the allotment has been received since Fargo is located within 320 kilometers (200 miles) of the U.S.-Canadian border. As proposed, we will also modify Station KFNW-FM's license to specify Channel 250C.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 21, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Fargo, North Dakota	229C, 250C, 270C, 300C

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Northwestern College for Station KFNW-FM, IS MODIFIED to specify operation on Channel 250C, in lieu of Channel 250C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Northwestern College, licensee of Station KFNW-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 250C at Fargo are North Latitude 47-00-37 and West Longitude 97-11-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-54

In the Matter of

Amendment of Section 73.202(b),	RM-7937
Table of Allotments,	
FM Broadcast Stations.	
(North Madison, Ohio)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 5, 1992; Released: November 5, 1992

By the Chief, Allocations Branch:

1. At the request of Lakeshore Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 2095 (1992), proposing the allotment of Channel 229A to North Madison, Ohio, as the community's first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 229A to North Madison, since an interest has been expressed in providing the community with its first local aural transmission service. Channel 229A can be allotted to the community with a site restriction of 9 kilometers (5.6 miles) west-southwest to avoid short-spacings to Stations WZAK, Channel 226B, Cleveland, Ohio, and WBZZ, Channel 229B, Pittsburgh, Pennsylvania.[1] The site restriction imposed on the allotment does not eliminate the short-spacings to Stations CBCL-FM, Channel 228C1, London, Ontario, and CKLW-FM, Channel 230C1, Windsor, Ontario, Canada. However, the North Madison station can limit its power in the direction of London and Windsor to avoid prohibited overlap with these stations. Therefore, Canadian concurrence in the allotment of Channel 229A to North Madison, as a specially negotiated allotment, has been received. North Madison is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 21, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
North Madison, Ohio	229A

4. The window period for filing applications will open on **December 22, 1992,** and close on **January 21, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 229A at North Madison are North Latitude 41-47-31 and West Longitude 81-09-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-246

In the Matter of

Amendment of Section 73.606(b), RM-8091
Table of Allotments,
TV Broadcast Stations.
(Ridgecrest, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 5, 1992; Released: November 5, 1992

Comment Date: December 28, 1992
Reply Comment Date: January 12, 1993

By the Chief, Allocations Branch:

1. The Commission has before it a petition for rule making filed by Valley Public Television, Inc. ("petitioner"), licensee of educational television Station KVPT, Channel *18, Fresno, California, requesting the substitution of Channel *41 for Channel *25 at Ridgecrest, which is reserved for noncommercial educational use, or alternatively, the placement of a site restriction on Channel *25 at Ridgecrest to accommodate petitioner's application site for a new noncommercial education television station on Channel *39 at Bakersfield (File No. BPET-900904KF).[1]

2. Valley notes that the facility it is proposing in its Bakersfield application is short-spaced to the reference point coordinates of Channel *25 at Ridgecrest, an isolated community located in the desert area of eastern California. Valley contends that the allotment of Channel *41 in lieu of Channel *25 to Ridgecrest would eliminate the short-spacing. Valley further contends that the allotment of Channel *41 to Ridgecrest will maximize the efficient use of Channel *39 in Bakersfield by permitting operation of the channel from Valley's preferred site, releasing Channel *25 for use in another community and permitting the retention of an educational television channel allotment at Ridgecrest. Valley argues that Channel *25 at Ridgecrest cannot currently be used because of the freeze instituted in light of the advanced television proceeding.[2] Valley points out that there has been no interest shown in Channel *25 since its allotment 25 years ago. Valley further states that the allotment of Channel *41 to Ridgecrest poses no technical problems and would have no adverse effect on any other allotments or operating stations. Alternatively, Valley maintains that Channel *25 could be retained at Ridgecrest with a site restriction that would clear Valley's application.

3. We believe the public interest would be served by seeking comments on the substitution of Channel *41 for Channel *25 at Ridgecrest, or alternatively, the placement of a site restriction on Channel *25, to accommodate Valley's application site for Channel *39 at Bakersfield.[3]

4. Channel *41 can be allotted to Ridgecrest in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.5 kilometers (0.3 miles) southwest of the community.[4] Alternatively, Channel *25 can be site restricted to accommodate Channel *39 at Bakersfield with a site restriction of 10.6 kilometers (6.6 miles) east of the community.[5]

5. Accordingly, we seek comments on the proposed amendment of the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ridgecrest, California	*25	*41

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix

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[1] Valley's petition for rule making was initially dismissed by letter on the grounds that the Ridgecrest channel substitution had been proposed in the context of MM Docket 85-390. While the proposed substitution at Ridgecrest was not adopted, the proceeding remained pending due to the filing of an application for review. *See* Letter from Chief, Allocations Branch, to counsel for Valley (May 1, 1991). *See also Report and Order* in MM Docket No. 85-390, 2 FCC Rcd 5882 (1987). Valley filed a petition for reconsideration of the letter dismissal and again requested the initiation of a rule making proceeding. While Valley's petition was pending, the Commission resolved MM Docket 85-390. *See Memorandum Opinion and Order (Ventura, California)* FCC 92-401, released September 1, 1992. In light of the above, Valley's substitution request at Ridgecrest can now be entertained. We will dismiss Valley's petition for reconsideration as moot at the termination of this proceeding.

[2] *See Advanced Television Systems and Their Impact on the Existing Television Service* in MM Docket 87-268, 52 Fed. Reg. 28346, published July 29, 1987.

[3] The use of Channel *41 at Ridgecrest would be short-spaced to a land mobile sharing proposal for Channel 42 at Los Angeles. *See Amendment of the Rules Concerning Further Sharing of the UHF Television Band by Private Land Mobile Radio Services (Notice of Proposed Rule Making)* in Docket 85-172, 50 Fed. Reg. 25587 (June 20, 1985). That proceeding does not specifically address the question of new television allotment proposals that conflict with proposed land mobile channels. However, with respect to applications for new, and modifications of, full service television stations, the item states, "We will protect full-service television stations on the basis of existing facilities, *i.e.*, those for which a license or a construction permit was issued before the date this *Notice* is adopted. If an application for a new station is inconsistent with one of the proposed land mobile allocations, we will determine the degree of protection, if any, to be afforded the proposed television facility on a case-by-case basis in this rule making. New service resulting from the approval of applications received after adoption of the *Notice* in this proceeding, whether for new stations or authority to modify the facilities of existing stations, must accept such interference as may result from the operation if land mobile facilities permitted under the rules adopted in this proceeding." Consequently, if the substitution of Channel *41 for Channel *25 at Ridgecrest is made any application will be subject to the above considerations.

[4] The coordinates for Channel *41 at Ridgecrest are North Latitude 35-37-22 and West Longitude 117-40-29.

[5] The coordinates for Channel *25 are: North Latitude 35-38-58; West Longitude 117-33-24.

and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 28, 1992,** and reply comments on or before **January 12, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Lonna M. Thompson, Esq.
Richard Hildreth, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036-2679

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Television Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b) and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

October 30, 1992

Released: November 5, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Headliner Radio, Inc.	8310-HTS
Licensee, Radio	92080365
Station KSXY-FM	92080179
(formerly KFIG-FM)	
732 North Van Ness Avenue	
Fresno, California 93728-3424	

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture of three thousand one hundred twenty-five dollars ($3,125) pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules. The Notice of Apparent Liability is issued for your violation of Section 73.1216 of the Commission's Rules, which pertains to licensee-conducted contests.

On June 15, 1992, the Commission received a complaint about the "$100 Every Thirty Minutes" contest that aired on Station KFIG-FM during June 1992. The Complainant alleged that the promotional advertisements for the contest were misleading in violation of Section 73.1216 of the Commission's Rules. The contest required listeners, when they heard the sound of the cash register, to call KFIG-FM, with the tenth caller winning $100.00. For example, while on June 6, 1992, KFIG-FM newspaper advertisements and promotional announcements indicated that these $100.00 cash prizes would be awarded every thirty minutes throughout the day, the Complainant alleged that such prizes were awarded only until 1:00 p.m. on that day. On July 28, 1992, the Commission sent you a letter of inquiry regarding the contest.

On August 3, 1992, you submitted a response in which you denied the allegation. You asserted that the advertisements on-the-air were not intended to mislead your listeners. In your view, the advertisements clearly indicated that the contest would "start and stop" at any time, and that the money would be given away only during such contest periods. To support your claim, you submitted the transcript of live advertisements and the written contest rules. The written contest rules were available before, during, and after the contest and they stated that the contest periods could be as short as 90 minutes or as long as five hours.

You admitted that the newspaper advertisement, which ran seven times in the Fresno Bee newspaper, was misleading the first time it ran because it omitted the words, "during designated hours." You explained that the error was inadvertent and made by an advertising agency. When the omission was discovered, you ran the corrected newspaper advertisement the next six times.

You also submitted a second response on August 14, 1992, which included a tape of the recorded advertisements. You explained that the recorded advertisements featured one advertisement for broadcast during contest hours and the other one for non-contest hours. You asserted that neither spot indicated that the contest would continue indefinitely. You asserted that the two advertisements were clear as to how the contest was conducted and that there was no deception. In particular, the second spot, which always aired within thirty minutes of your last money giveaway, clearly pointed out that you could start a contest period "at any time." You indicated that the second spot aired approximately 500 times during June 1992, and the first spot aired about 100 times.

Section 73.1216 provides that, "[a] licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and shall conduct the contest substantially as announced or advertised. No contest description shall be false, misleading or deceptive with respect to any material term."

After reviewing the transcript and tape you provided, we find that some advertisements promoting the contest were misleading as to material terms in the contest. Namely, such advertisements did not clearly explain that the contest would be conducted only during specific periods. Instead, they indicated that you would be giving away $100 during each and every hour of operation.

By your own admission, the first time you ran the newspaper advertisement[1] for the "Every Thirty Minute" contest in the Fresno Bee Newspaper, it was misleading as it did not include the words, "during designated hours." Similarly, you admitted in the June 15, 1992, letter to Complainant, that the advertisement for the contest was unclear as to the way that the contest was conducted and that you, therefore, changed the language of the advertisement. You have also not denied that on June 6, 1992, as the Complainant alleged, you stopped taking calls and naming winners after 1:00 p.m., although you continued to air the advertisement for the contest frequently during much of the rest of the day.

Our review of the transcript you supplied also indicates that some radio advertisements were deceptive or misleading as to certain material terms of the contest. Some advertisements indicated a start and stop time by stating, for example, "while we are doing the contest," or "we'll let you know when we start and when we stop," or "we're giving away $100 Every Thirty Minutes and we'll do it

[1] . "Just tune your radio to 101.1 FM and listen for the sound of the cash register. When you hear it, call 268-KFIG. The tenth caller wins a hundred dollars. It's that easy and it happens every thirty minutes."

until we give away $1,000." Other times, however, the words did not indicate when the contest ended, as in the following advertisements.

> 1. It's $100 Every Thirty Minutes and it could start at any time. Your chance to win is coming up.
>
> 2. Listen for the sound of the Cash Register and then call 268-KFIG. You could win $100 and we're doing it Every Thirty Minutes. It's $100 Every Thirty Minutes on K-fig.
>
> 3. It's $100 Every Thirty Minutes starting tomorrow morning in the 8 o'clock hour. Listen for your chance to win with Radio Station K-fig.
>
> 4. Listen and win with K-fig. Starting in the 8 o'clock hour tomorrow morning we'll give you a chance every thirty minutes to win $100. It all happens on K-fig.
>
> 5. Listen for Figmo tomorrow morning on K-fig. He'll have $100 every thirty minutes, and you can win it. It all starts at 8 AM.
>
> 6. It's $100 every thirty minutes starting at 8 AM tomorrow with Michael W. Scholl. Listen and win with K-fig.
>
> 7. Michael W. Scholl has $100 every thirty minutes and you could win it all. It starts at 8 AM tomorrow on K-fig.
>
> 8. . . . Congratulations to all our winners today, the response has been just wonderful. Since the 8 o'clock hour this morning we have given away $100 Every Thirty Minutes and we could do it again at any time. Listen and win with K-fig, the station that puts the money where the music is.

And, the advertisements on the tape you submitted, (see enclosed transcript of tape), are also unclear on material terms of the contest. For example, "$100 dollars every thirty minutes and it could start anytime," and "listen for the cue to call, it could happen at anytime," indicates the beginning of the contest but not the end.

In sum, you appear to have violated Section 73.1216 of the Commission's Rules in June 1992 by airing contest descriptions that were deceptive or misleading as to material terms of the contest. Accordingly, pursuant to Section 503(b) of the Communications Act, Headliner Broadcasting, Licensee of Radio Station KFIG-FM, which has changed its call sign to Radio Station KSXY-FM, is hereby advised of its apparent liability for a forfeiture of three thousand one hundred twenty five dollars ($3,125).

The forfeiture amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under our new forfeiture standards, the base amount for a violation of Section 73.1216 of the Commission's Rules is six thousand two hundred and fifty dollars ($6,250). Nevertheless, your actions in this matter exhibit good faith as you clarified the ambiguous and misleading nature of contest descriptions when it was brought to your attention well before the Commission became involved. Thus, we will reduce the forfeiture to three thousand one hundred twenty-five dollars.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3).

Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSIONN

Roy Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-92-201

Application for authority to convey half-interests in the G-P-T Cable System.

ORDER AND AUTHORIZATION

Adopted: October 15, 1992; Released: November 5, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that grant of the application is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-201 IS GRANTED, and AT&T is authorized to convey certain half-interests in capacity, on an ownership basis, in the G-P-T cable system,[1] as described below:

Segment[2]	Half-MAUOs	From[3]	To:	Approximate Total Cost[4]
G-P	90	AT&T/ PLDT	KDD/ PLDT	$1,109,800
G-P	30	AT&T/ PLDT	TNZI/ PLDT	$ 370,000
G-P	30	AT&T/TM	TNZI/TM	$ 370,000
G-P	30	AT&T/ PLDT	MCII/ PLDT	$ 370,000
G-T	30	AT&T/ ITDC	MCII/ ITDC	$ 222,900
G-T	6	AT&T/ ITDC	MCII/ ITDC	$ 44,600
G-T	60	AT&T/ ITDC	MCII/ ITDC	$ 445,800
G-T	30	AT&T/ ITDC	OTC/ ITDC	$ 222,900
G-T	30	AT&T/ ITDC	TNZI/ ITDC	$ 222,900

3. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

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[1] G-P-T Section 214 Authorization, 3 FCC Rcd 5091 (1988).

[2] G-P = Guam - Philippines Segment
G-T = Guam - Taiwan Segment

[3] ITDC = International Telecommunication Development Corp. (Taiwan)

KDD = Kokusai Denshin Denwa Co., Ltd. (Japan)

MCII = MCI International, Inc.

OTC = Australian and Overseas Telecommunications Commission (Australia)

PLDT = Philippine Long Distance Telephone Co. (Philippines)

TM = Telekom Malaysia Berhad (Malaysia)

TNZI = Telecom New Zealand International Limited (New Zeland)

[4] All costs represent depreciated original (net book).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

D.W.S., Inc. File Nos. BR-890720UD
BRH-890720UM

For Renewal of Licenses of
Stations WDWS(AM)/WHMS-FM
Champaign, Illinois

UNO Broadcasting Corporation File Nos. BR-890728VE
BRH-890728VF

For Renewal of Licenses of
Stations WJOL(AM)/WLLI-FM
Joliet, Illinois

Central Illinois Broadcasting Co. File No. BRH-890801XT

For Renewal of License of
Station WWCT(FM)
Peoria, Illinois

Midwest Management, Inc. File Nos. BR-890801VO
BRH-890801XF

For Renewal of Licenses of
Stations WNTA(AM)/WKMQ(FM)
Rockford and Winnebago, Illinois

MEMORANDUM OPINION AND ORDER

Adopted: September 14, 1992; Released: September 21, 1992

By the Commission: Commissioner Quello concurring in the result.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications for the seven captioned radio stations; (ii) a Petition to Deny timely filed on November 1, 1989,[1] by the Illinois State Conference of Branches of the National Association for the Advancement of Colored People (NAACP) and various local branches of the NAACP against the above-captioned renewal applications;[2] (iii) the licensees' oppositions to the petition; (iv) the licensee's responses to Commission inquiries; and (v) various other pleadings. The NAACP alleges that the challenged stations violated the Commission's EEO rules and policies. Accordingly, it requests that we investigate the stations' employment practices and designate the renewal applications for hearing.

II. PROCEDURAL MATTERS

2. *Standing.* The licensee of WDWS(AM)/WHMS-FM argues that the NAACP failed to establish standing because the president of the Illinois State Conference does not claim to be a listener of the stations or a resident within the stations' service area and the affidavit submitted by the president of the local Champaign County NAACP Chapter is not sufficiently specific. In challenging an application pursuant to Section 309(d) of the Communications Act, as amended, 47 U.S.C. Section 309(d), a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. Section 309(d)(1). *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of the Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the petition were declarations under penalty of perjury from the President of the Illinois State Conference of the NAACP, the Champaign County Chapter NAACP president concerning WDWS(AM)/ WHMS-FM, the Joliet Branch NAACP president regarding WJOL(AM)/WLLI-FM, and the Rockford Branch NAACP president regarding WNTA(AM)/WKMQ(FM). The Commission has held that the statement of a person who does not claim to be a listener of the challenged station or a resident of its service area does not satisfy the standing requirements of the Act. *See Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio*, 3 FCC Rcd 6944 (1988); *see also Applications of KDEN Broadcasting Co. for Renewal of License of Station KDEN, Denver, Colorado*, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984). Except for the declaration of the state president, all declarations indicate that the branch presidents are listeners of the challenged stations. While the declaration of the state president does not establish standing, the other declarations give standing to the branches as well as to the Illinois State Chapter of the NAACP. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). Accordingly, we find, that the pleading filed by the NAACP constitutes a valid petition to deny against WDWS(AM)/WHMS-FM, WJOL(AM)/WLLI-FM and WNTA(AM)/WKMQ(FM).

4. The petition also included a timely filed declaration from the president of the Peoria Branch of the NAACP. However, the licensee of WWCT(FM) argues that the petition is invalid because neither it nor its attorney was served. In *Letter from Charles W. Kelley, Enforcement Di-*

[1] The Petition to Deny also was directed against seven other radio stations in Illinois. Four of these stations' renewal applications have already been acted on by the Commission. The remaining three renewal applications are pending.

[2] The National Black Media Coalition (NBMC) was captioned as a petitioner. However, by letter dated November 27, 1989, David Honig, counsel for the NAACP, indicated that the NBMC was inadvertently added as a party.

vision Chief, to Bruce T. Foster, President, Central Illinois Broadcasting Co., Inc., (March 16, 1990), the staff concluded that the NAACP's pleading was procedurally defective as to WWCT(FM). *See* 47 U.S.C. Section 309(d)(1); 47 C.F.R. Section 1.47. The staff concluded that the NAACP did not have petitioner standing, but that the NAACP challenge would be treated as an informal objection as to WWCT(FM). *See* 47 C.F.R. Section 1.41. We agree.

III. PLEADINGS

5. The NAACP derived factual allegations from the licensees' EEO programs and annual employment reports. Review of the licensees' EEO records led us initially to conclude that the NAACP presented a *prima facie* case demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, as amended, 47 U.S.C. Section 309(d)(1). *Astroline, supra.*[3] *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual-Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

6. However, subsequent review of the NAACP's EEO allegations as well as the licensees' renewal applications, oppositions and inquiry responses leads us to conclude that there are no substantial and material questions of fact warranting designation for a hearing. In addition, we find no evidence of discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline, supra.* Accordingly, we will grant renewal, but with appropriate remedies and sanctions.

IV. DISCUSSION

7. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee.

8. When the renewal application indicates an absence of evidence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies and sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the renewal application for hearing where the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*), *petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

WDWS(AM)/WH MS-FM, Champaign[4]

9. The stations' 1989 EEO program report and opposition/inquiry response indicate that from August 1, 1986, through August 1, 1989, there were eight full-time upper-level hiring opportunities. The licensee states that it contacted but received no minority referrals from the following minority and female sources: the NAACP, the Afro-American Cultural Center, the University of Illinois Non-Academic Affirmative Action Office, the Champaign County Urban League, the NAACP's Champaign County president and A Woman's Place. The licensee states that it did receive one minority referral each from the *Daily Illini* and employees. Other general sources producing no minority referrals included the *Champaign Urbana News Gazette*, the University of Illinois Office of Student Financial Aid, Parkland College, the State of Illinois Employment Office and the Champaign Consortium. No recruitment was done for one vacancy. However, for six additional vacancies, the licensee contacted six general sources, one minority and one female source. The licensee states that after February 1989, a time period which included the eighth and last vacancy, it added three minority sources and one general source to its list of recruitment sources. Of the 16 interviewees for the eight positions, the licensee interviewed four minorities--one Asian, one Hispanic and two Blacks--and hired two minorities--one Asian and one Hispanic.[5]

10. The NAACP maintains that the only minority employee on the stations' staff since 1980 was an Asian female reported in 1989. The NAACP states that none of the sources listed in the stations' renewal application produced any minority referrals except for one generated by the University of Illinois college newspaper. The NAACP contends that the licensee should have identified the minority leaders and sources that the licensee mentions contacting in its application's attachment. It argues that the licensee owed more attention to this problem after at least 15 years of noncompliance.[6]

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[3] As is our practice in all cases, we reviewed the licensees' efforts toward both women and minorities. We find each licensee's record of recruiting women, except where noted, sufficient.

[4] WDWS-FM changed its call letters to WHMS-FM on November 1, 1988.

[5] We note that the licensee states that it offered one of the eight positions to a Black female who declined the offer.

The Champaign-Urbana-Rantoul, Illinois Metropolitan Statistical Area is 10.3% minority (7.2% Black, 1.1% Hispanic, 1.8% Asian and .2% American Indian). The stations' 1989 Annual Employment Report lists one Asian on an overall staff of 29 (3.4%) and on an upper-level staff of 28 (3.6%). The stations' 1983 through 1988 Annual Employment Reports list no minorities on the full-time staff ranging from 26 to 28 employees.

[6] The NAACP requests that the Commission review the licensee's activities for the past four license terms. However, we will review the licensee's record only during the license term immediately preceding the filing of its 1989 renewal application, as Commission precedent dictates. *See United Broadcasting Co., Inc.*, 100 FCC 2d 1574, 1577 (1985).

11. In response, the licensee states that it has made positive and consistent efforts to recruit, employ and promote minorities as well as to engage in ongoing self-assessment of its EEO efforts, taking corrective action when necessary. The licensee contends that since the last renewal, it has contacted sources likely to refer minority applicants for every opening. The licensee states that it met with minority community leaders[7] in February 1989 to obtain suggestions on improvements to the stations' EEO program. After February 1989, the licensee states that it began contacting an additional three minority and one general source when vacancies occurred. Also, it began participating in the Illinois Broadcasters Association Minority Intern Training Program in August 1989 and presently employs a Black male intern from this source.

12. Further, with the hiring of an Hispanic male in April 1989, the licensee contends that it now has two minorities on its staff, one Asian and one Hispanic and, therefore, exceeds the Commission's processing guidelines.[8] It acknowledges that neither Hispanics nor Asians are the dominant minority group in the stations' applicable labor force, but argues that the Commission would still consider the employment of members of these two groups noteworthy because they represent a significant percentage of the laborforce, 1.4% and 1.8%, respectively.

13. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. The licensee's record does not reveal evidence of discrimination. The stations did use minority sources for referrals, and attracted and hired minority applicants. However, the licensee did not fully self-assess its EEO program and take corrective actions to improve its performance with regard to Blacks, the dominant minority in the market, until the last months of the license term. While we compare the overall number of minority employees with the applicable minority labor force, we give particular attention to a station's efforts towards the dominant minority in the labor force. *Bilingual* at 625. In this regard, we note that, although a number of sources likely to refer Blacks existed as is exemplified by the licensee's late term modifications to its EEO program, the licensee only contacted one of these sources for six of eight vacancies. These contacts produced no Black applicants. Therefore, we encourage the licensee to increase its efforts to recruit qualified Black applicants when openings occur.

WJOL(AM)/WLLI-FM, Joliet

14. Review of the licensee's 1989 EEO program report, opposition and inquiry response reveals that from October 1, 1987, through July 14, 1989, there were 12 full-time hiring opportunities, including 11 upper-level. In its EEO program, the licensee indicates that it received one minority referral from the College of St. Francis but received no minority referrals from on air ads or Lewis University. In addition, the licensee states that only the on-air ads produced female referrals (4). The licensee states that in June 1989, two months before filing its renewal application, it began contacting two local newspapers, the *Herald News* and the *Suburban Tribune*. How often the licensee contacted recruitment sources as well as the number, race and gender of applicants and interviewees is unclear because the recruitment information provided in two inquiry responses is limited to three of the 12 positions. The licensee contends that, other than this data, it did not have available records covering the period under review and that the General Manager during that time was not available. The licensee hired two women, including one for an upper-level position, and no minorities.[9]

15. The licensee acknowledges that the stations' outreach program was limited until July 1989. The licensee states that in July 1989, it named the stations' Black Program Director as EEO Director and added several minority organizations to the stations' list of recruitment sources. These organizations included Joliet-Operation Push, Trainco (a local business school), the Shorewood Chapter of the NAACP, the Spanish Center and the Salvation Army. The licensee contends that as a result of its expanded EEO program, the stations hired three minorities (one Black female for a full-time position and one Black male and one Asian female for part-time positions) in September and October 1989.

16. Challenging the licensees' efforts, the NAACP argues that the licensee listed only one minority referral and no minority organizations, media or educational institutions in its renewal application and hired no minorities for the six vacancies occurring during the reporting year, the year prior to the filing of the renewal application. Moreover, the NAACP notes that, in an attachment to the licensee's EEO program, the licensee promised the use of three minority organizations for recruitment. However, the NAACP contends that the licensee promised to use three different minority organizations in its 1987 assignment application yet did not indicate that it had contacted any of those three organizations in its renewal application. Thus, the NAACP argues that designation for hearing after further investigation is warranted to determine whether the licensee's activities reflect "deliberate violation of the EEO Rule or discrimination."

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[7] In its opposition/inquiry response, the licensee lists the names of these community leaders and also includes a sworn declaration from one of the leaders attesting to the meeting.

[8] As we have indicated previously, meeting or exceeding the guideline is not a "safe harbor" and neither exempts the licensee's program from review by the Commission nor permits it to slacken or cease its recruitment efforts. *See Broadcast EEO, supra* at 3974.

[9] The Joliet Illinois Metropolitan Statistical Area is 39.7% female and 12.0% minority (7.5% Black and 3.5% Hispanic). The present licensee took control of the stations in October 1987. In 1988, the stations employed six females (20.7%) and three minorities, two Blacks and one Hispanic, (10.3%) on an overall staff of 29 and three females (12.0%) and one Black (4.0%) on an upper-level staff of 25. The stations' 1989 Annual Employment Report indicates that as of January 7, 1989, they employed six females (20.0%) and three minorities, two Blacks and one Hispanic, (10.0%) on an overall staff of 30 and two females (8.0%) and one Black (4.0%) on an upper-level staff of 25. In an attachment to its renewal application, the licensee indicates that as of July 14, 1989, the stations employed six females (25.0%) and three minorities, two Blacks and one Hispanic, (12.5%) on an overall staff of 24 and four females (19.0%) and one Black (4.8%) on an upper-level staff of 21. In an attachment to its opposition, the licensee indicates that as of October 6, 1989, the month before the petition to deny was filed, eight females (34.8%) and four minorities, three Blacks and one Hispanic, (17.4%) were employed on the stations' overall staff of 23 and six females (30.0%) and two Blacks (10.0%) were employed on their upper-level staff of 20.

17. In its opposition, the licensee argues that no hearing is required because the NAACP has presented no evidence of overt discrimination or proved that any substantial statistical disparity exists between the available minority labor force and the stations' minority employment. The licensee contends that it has exceeded the Commission's guidelines[10] for overall minority employment and has been successful in the hiring of Blacks for upper-level positions throughout its two year ownership of the stations. While acknowledging that its outreach efforts prior to July 1989 "were not as aggressive as they should have been," the licensee argues long before the petition to deny was filed, it took steps to remedy the situation.

18. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. The licensee's record does not reveal a record of discrimination. The stations did modify their EEO program, albeit only two months before filing their renewal applications, and attract and hire minority applicants. See paragraph 15, *supra*. We are concerned that the licensee did not appear to have a functioning EEO program until one and a half years after it took control of the stations. It did not keep the documentation necessary for meaningful self-assessment of its EEO program and failed to alter its list of reruitment sources until mid-1989 even though the low number of women employed in upper-level positions and its lack of success in attracting qualified minority applicants should have alerted it to a problem recruiting these two groups.

19. The record of the instant case is similar to that of WRGI(FM) in *Letter to Allan W. Roberts, President, All Communications of Naples, Florida*, 4 FCC Rcd 3463 (1989). In that case, we found that the licensee failed to contact sources likely to refer minorities, failed to expand its list of unproductive sources until three months prior to filing its renewal application and did not keep adequate records of its EEO efforts necessary for meaningful self-assessment of its EEO program. The licensee also had the station for approximately two years. Accordingly, we imposed reporting conditions.

20. Similarly, the licensee in the instant case failed to contact sources likely to refer minorities or expand its list of unproductive recruitment sources until two months prior to filing its renewal application. It also did not keep adequate record of its EEO efforts necessary for meaningful self-assessment. At the same time, the licensee did hire minorities, albeit late in the term, and consistently employed a significant number of minorities throughout the license term. Therefore, we grant renewal subject to reporting conditions to monitor future performance.

WWCT(FM), Peoria

21. Review of the licensee's 1989 EEO program report and inquiry response reveals that from July 10, 1986, to July 10, 1989, the station had 13 hiring opportunities, including 12 upper-level. The licensee states that it contacted and received four minority referrals from the *Peoria Journal Star*. It indicates that it contacted but received no minority referrals from Illinois Central College, Bradley University, American Women in Radio and Television, employees, three trade journals and other stations. The licensee states that it contacted the *Peoria Journal Star*, three trade journals or another station for eight of the 13 vacancies and did not know the sources contacted for an additional vacancy. For the remaining vacancies, the licensee drew applicants from applications already on file. The only person who applied was the person hired for six vacancies. The licensee did not know the number, race or gender of applicants for four additional vacancies and only knew the number of applicants for the remaining positions. The licensee states that it interviewed nine individuals, none of whom were minorities, for eight positions. However, it is unclear if any minorities were interviewed for the remaining positions because the licensee contends that it knew the number and/or gender but not the race of the interviewees for all but one of the vacancies. However, minorities were not among the 13 hires.[11]

22. The NAACP states that no minority media, organizations or colleges were listed in the station's renewal application and no minorities were hired for the six positions occurring during the reporting year. The NAACP also quotes figures from the station's 1982-1989 Annual Employment Reports and points out that these reports reflect no minorities employed at the station. The NAACP states that the licensee responded "None" to Question 4 in Section VIII of the renewal application which asks the licensee to indicate what efforts it has undertaken, or will undertake to promote equal opportunity in its employment and to encourage applications from minorities and women. The NAACP contends that this response constitutes an admission of a violation of the EEO Rule and the licensee's renewal application should promptly be designated for hearing.

23. Based on our review of the licensee's renewal application and opposition and the NAACP's petition, we find no substantial and material question of fact to warrant a hearing or any evidence of discrimination.[12] The licensee did recruit for most positions and received some minority referrals. However, the record of the instant case is similar to but less egregious than that of the licensee of WMMK(FM) in *Applications of Certain Broadcast Stations Serving Communities in Miami, Florida*, 5 FCC Rcd 4893 (1990). In that case, we found that the licensee failed to keep any information regarding the number, race, gender or recruitment sources of interviewees; failed to attract qualified minority applicants and yet made no attempt to contact sources likely to produce minority applicants; failed to evaluate the progress of its EEO program; and failed to hire any minorities despite 16 hiring opportunities in an area which is 9.8% minority. Accordingly, we imposed reporting conditions and a Notice of Apparent Liability of Forfeiture for $15,000.

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[10] *See* n.8, *supra*.

[11] The Peoria, Illinois Metropolitan Statistical Area is 6.5% minority (4.9% Black, .9% Hispanic and .7% other). The station's 1984 through 1989 Annual Employment Reports list no minorities on full-time staffs ranging from 13 to 17.

[12] We do not agree with the NAACP's argument that the licensee's reply in its renewal application constitutes an admission of a violation of the EEO Rule. The licensee indicates in its inquiry response that it has undertaken efforts to promote equal opportunity in its employment and it did obtain minority referrals from a recruitment source. Therefore, we assume that the licensee's reply was in error. However, we admonish the licensee to accurately fill out its renewal application.

24. Similarly, the licensee of WWCT(FM) failed to meaningfully self-assess its EEO program; failed to attract qualified minority applicants yet made no attempt to alter its list of recruitment sources; and failed to hire any minorities despite having 13 hiring opportunities. However, the licensee of WWCT(FM) did keep some applicant flow and interviewee data and did receive four minority referrals. It also had a slightly smaller number of hiring opportunities and was in an area with a slightly smaller minority labor force (6.5%). Accordingly, we conclude that renewal subject to reporting conditions to monitor future EEO performance and a Notice of Apparent Liability of Forfeiture for $10,000 is warranted.

WNTA(AM)/WKMQ(FM), Rockford and Winnebago[13]

25. Review of the 1989 EEO program report, opposition and inquiry response indicates from July 1, 1986, through July 1, 1989, the stations had 27 full-time hiring opportunities, including 26 upper-level. At least two of the following general recruitment sources were contacted to fill four vacancies and only one of these sources was contacted to fill six other positions: the *Rockford Register Star*, Northern Illinois University, Employment Resources, Inc., Rockford College and the Rockford Chamber of Commerce. The sources of applicants listed for the remaining 17 vacancies included employees, unsolicited applications, other stations, industry peers, former employees, present employees and a station consultant. None of the 70 applicants referred by these sources was a minority. The person hired was the only applicant considered for 18 of the 27 vacancies. None of the 27 full-time hires was a minority.[14]

26. The NAACP states that, despite the fact that the licensee employed no minorities for the last four years of the license term, it did not propose the use of any minority organizations, media or educational institutions in its renewal application. Furthermore, the NAACP contends that the renewal application is contradictory because it lists no minority referrals received from sources during the reporting year yet lists the hiring of a minority during the same period. Lastly, the NAACP argues that because the licensee did not propose any affirmative action efforts it should be put in hearing.

27. In response, the licensee states that it has employed minorities at the stations. The licensee states that presently the stations employ a Black promoted from a part-time to a full-time upper-level position in March 1989, and an Hispanic as a part-time clerical. It reports employing another minority part-time in 1987 who was not employed during the Annual Employment Report's reporting period. The licensee argues that its employment of minorities is significant considering that the small size of the stations' staff (24) combined with the small local minority labor force means that employing one minority would meet the Commission's 50% of parity test.[15] It also states that its minority hiring efforts should be considered even more substantial given the relatively few true job openings occurring at the stations over the last several years. In support, it notes that during the period under review "only [13] full or part-time hires were made where a general opening existed." The remaining positions, according to the licensee, were "created," when individuals with special qualifications approached the stations.[16] In fact, the licensee states that this latter method of hiring resulted in the employment of two of the minorities cited above "demonstrating that the stations will make a position for a person regardless of race." The licensee notes, however, that even with its present success at hiring minorities, there is always room for improvement. Towards this end, it states in its January 26, 1990, opposition/inquiry response that it has discussed the matter with the NAACP and that the NAACP gave suggestions for possible improvements to the stations' EEO program, several of which the licensee states it will undertake.

28. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing or any evidence of discrimination. The licensee did promote a minority from a part-time to a full-time position in the last year of the license term. We find that the record of the instant case is similar to that of the licensee of WGUL(AM)/WGUL-FM in *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893 (1990). In that case, we found that the licensee failed to recruit or hire minorities for full-time positions despite 14 hiring opportunities in an area with a 15.2% minority labor force. Accordingly, we granted renewal for a short term subject to reporting conditions and a Notice of Apparent Liability of Forfeiture for $15,000.

29. Similarly, the licensee of WNTA(AM)/WKMQ(FM) failed to recruit or hire minorities on a full-time basis despite 27 hiring opportunities in an area with an 8.9% minority labor force. Accordingly, we conclude that granting renewal for a short term subject to a Notice of Apparent Liability of Forfeiture for $15,000 and reporting conditions to monitor future performance is warranted.

V. CONCLUSION

30. Upon review of the record and the submissions of the parties, we find grant of the renewal applications justified in all cases. However, to ensure that better efforts are taken with their respective EEO programs, we will impose reporting conditions on the licensee of WJOL(AM)/ WLLI-FM. Further, because of serious, repeated violations of the Commission's EEO Rule, we will grant renewal of WWCT(FM)'s application subject to reporting conditions and a Notice of Apparent Liability of Forfeiture for $10,000. In addition, we will grant renewal of WNTA(AM)/WKMQ(FM)'s application for a short term subject to reporting conditions and a Notice of Apparent Liability of Forfeiture for $15,000.

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[13] WKKN(AM) changed its call letters to WNTA(AM) on January 1, 1992.

[14] The Rockford, Illinois Metropolitan Statistical Area is 8.9% minority (6.2% Black, 1.9% Hispanic and .8% other). The stations' 1983 through 1989 Annual Employment Reports list no minority employees on full-time staffs ranging from 16 to 23.

[15] *See* n.8, *supra*.

[16] Although the licensee states that it "created" 17 fulltime positions, the Annual Employment Reports show that the number of total full-time employees declined during the period under review from 23 to 21. Thus, it is questionable whether the 17 positions were in fact additional positions.

VI. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED that the petition to deny filed by the Illinois State Conference of Branches of the NAACP and its affiliate branches (NAACP) against WJOL(AM)/WLLI-FM, WDWS(AM)/WHMS-FM and WNTA(AM)/WKMQ(FM) IS DENIED and the informal objection filed by the NAACP against WWCT(FM) IS DENIED.

32. IT IS FURTHER ORDERED that the license renewal applications of WDWS(AM)/WHMS-FM ARE GRANTED.

33. IT IS FURTHER ORDERED that the license renewal applications for WJOL(AM)/WLLI-FM, WWCT(FM) and ARE GRANTED subject to reporting conditions as specified herein.

34. IT IS FURTHER ORDERED that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, this document constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $10,000 for the licensee of WWCT(FM).

35. IT IS FURTHER ORDERED that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, the license renewal applications of WNTA(AM)/WKMQ(FM) ARE GRANTED subject to reporting conditions, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $15,000 and short term renewal ending December 1, 1994.

36. IT IS FURTHER ORDERED that the licensees of WJOL(AM)/WLLI-FM, WNTA(AM)/WKMQ(FM) and WWCT(FM) submit to the Commission an original and one copy of the following information on August 1, 1993, August 1, 1994, and August 1, 1995:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title, FCC job category and full-time or part-time status of the position, the race or national origin, sex, and the referral source of each applicant for each and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[17]

(b) A list of employees as of the July 1, 1993 payroll period for the first report and as of the July 1, 1994, and July 1, 1994 payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the stations' efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

37. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

38. The reports are to be filed with the Secretary of the Commission to the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch (202-632-7069). Regarding the forfeiture proceeding for WWCT(FM) and WNTA(AM)/WKMQ(FM), the licensees may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to their ability to pay should include those financial documents set forth in the noted attachment.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[17] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: Black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 72
F.C.C. No. 34	

ORDER

Adopted: October 21, 1992; Released: October 21, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On October 8, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective October 22, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 34 for AT&T Accunet Spectrum of Digital Services, Accunet T1.5 Service, Dataphone Digital Service, and Local Channel Services.

2. On October 15, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 72.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 34, Contract Tariff Transmittal No. 72 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 34, Contract Tariff Transmittal No. 72, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff F.C.C. No. 33	Transmittal No. 73

ORDER

Adopted: October 21, 1992; Released: October 21, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On October 8, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective October 22, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 33 for AT&T Accunet Spectrum of Digital Services, Accunet T1.5 Service, Dataphone Digital Service, and Local Channel Services.

2. On October 15, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 73.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 33, Contract Tariff Transmittal No. 73 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 33, Contract Tariff Transmittal No. 73, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff F.C.C. No. 35	Transmittal No. 74

ORDER

Adopted: October 22, 1992; Released: October 22, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On October 9, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective October 23, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 35 for AT&T Accunet Spectrum of Digital Services, Accunet T1.5 Service, Accunet T45 Service, Dataphone Digital Service, and Local Channel Services.

2. On October 16, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 74.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 35, Contract Tariff Transmittal No. 74 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 35, Contract Tariff Transmittal No. 74, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Transmittal No. 1589
Revisions to Tariff F.C.C. No. 128

ORDER

Adopted: October 21, 1992; Released: October 22, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 11, 1992, Pacific Bell filed Transmittal No. 1589, to establish two nonchargeable options, 64 Clear Channel Capability (64 CCC) and Access Transport Parameter (ATP), to be available with SS7 out-of-band signalling. Pacific Bell Description and Justification (D&J) at 1. The 64 CCC Option would allow customers to use the full 64 kilobit per second (kbps) bandwidth of a digital trunk channel. *Id.* ATP is a new Common Channel Signalling (CCS) option which facilitates Integrated Services Digital Network (ISDN) call set-up. ATP will be included as part of the Initial Address Message (IAM), which is the first out-of-band signalling message transmitted from the local exchange carrier to the interexchange carrier (IXC). *Id.* at 2-3. Pacific Bell does not plan to impose any new recurring charges for 64 CCC service, but plans to impose its existing Local Transport nonrecurring charge for both installing new trunks with 64 CCC service or adding 64 CCC service to an existing trunk. *Id.* at 5. Transmittal 1589 is scheduled to take effect on October 26, 1992.

2. On September 28, 1992, American Telephone and Telegraph Co. (AT&T) and MCI Telecommunications Corp. (MCI) filed petitions to reject or suspend and investigate Transmittal 1589. AT&T maintains that Pacific Bell has not provided adequate cost support as required by the price cap rules to justify setting its 64 CCC conversion charge equal to the nonrecurring charge associated with initial installation of Feature Group D service. AT&T Petition at 2-3. AT&T argues that this charge is unreasonable because it believes 64 CCC involves only limited software modifications rather than installation of new facilities. *Id.* at 3-4. AT&T also notes that NYNEX plans to offer 64 CCC conversion at half the Feature Group D installation charge, and Bell Atlantic plans to offer 64 CCC conversion free of charge. *Id.* at 4.

3. MCI claims that Transmittal 1589 does not permit "equal access" to the ISDN D-channel. MCI Petition at 2. MCI maintains that it is unclear whether Pacific Bell will adhere to American Network Standards Institute (ANSI) standards, which are developed in industry fora rather than unilaterally dictated by Bellcore or Pacific Bell. MCI requests that the Bureau require references to technical publications which specify ANSI standards. *Id.* at 3. MCI claims that the technical references cited by Pacific Bell do not permit ATP to be transmitted in "backward SS7 messages" (*i.e.*, the Address Complete Message and the Answer Message). *Id.* at 3-4. Finally, MCI criticizes the lack of discussion regarding maintenance of the lines used to provide 64 CCC service in the technical publications which are available. *Id.* at 4.

4. Pacific Bell filed its reply on October 8, 1992. Pacific Bell responds that imposing a full nonrecurring charge for conversion to 64 CCC service is appropriate, because conversion of an existing 56 kbps trunk to 64 CCC requires the same work as installing a new trunk. Pacific Bell Reply at 2-3. Pacific Bell denies that its charges would cost AT&T "several million dollars," asserting that its charges would cost no more than $250,000 if AT&T converted all its switched access 56 kbps trunks in California to 64 CCC. *Id.* at 4. Pacific Bell maintains that the D-channel capability requested by MCI is a lineside service, and therefore unrelated to 64 CCC, a trunkside service. *Id.* Similarly, Pacific Bell asserts that the ANSI standards cited by MCI are lineside standards not related to 64 CCC service. *Id.* at 5. Pacific Bell further claims that a future Bell Communications Research (Bellcore) technical publication to be issued in November will include specifications for "backwards" ATP. *Id.* Finally, Pacific Bell denies that performance and maintenance specifications are not set forth in any of its technical publications. *Id.*

5. The Common Carrier Bureau has reviewed Pacific Bell's Transmittal 1589 and all associated pleadings and submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petitions for rejection or suspension and investigation filed by American Telephone and Telegraph Co. and MCI Telecommunications, Inc., against Pacific Bell, Tariff F.C.C. No. 128, Transmittal No. 1589, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Transmittal Nos. 117 and 124
Telephone Companies
Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: October 21, 1992; Released: October 22, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 8, 1992, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 117,[1] to establish a nonchargeable option it calls 64 Clear Channel Capability (64 CCC), to be available with Feature Group D (FGD) trunks, or with Trunkside Basic Serving Arrangement (BSA) Option 3 with SS7 out-of-band signalling. The 64 CCC Option would allow customers to use the full 64 kilobit per second (kbps) bandwidth of a digital trunk channel. Initially, NYNEX expects this option to be used by interexchange carriers (IXCs) to establish interLATA calls between Integrated Services Digital Network (ISDN) end users. NYNEX Description and Justification (D&J) at 1-2. Transmittal 117 also introduces Access Transport Parameter (ATP), which provides additional signalling information. *Id.* at 3. NYNEX does not intend to impose a nonrecurring charge (NRC) for ordering a new FGD service with 64 CCC, beyond that charged for ordering FGD without 64 CCC. *Id.* at 6. However, NYNEX will impose a NRC, equal to half the existing local transport nonrecurring charge, when a customer adds 64 CCC to an existing service. *Id.* Transmittal 117 is scheduled to take effect on October 23, 1992.

2. MCI Telecommunications Corp. (MCI) filed a petition to reject or suspend and investigate Transmittal 117 on September 23, 1992. MCI claims that Transmittal 117 is not clear on whether IXCs will be able to offer services to end users over the ISDN D-channel, and maintains that such a limitation would place IXCs at a competitive disadvantage relative to NYNEX. MCI Petition at 2. MCI maintains that it is unclear whether NYNEX will adhere to American Network Standards Institute (ANSI) standards, which are developed in industry fora rather than unilaterally dictated by Bell Communications Research or NYNEX. MCI requests that the Bureau require NYNEX to refer to technical publications which specify ANSI standards. *Id.* at 3. In addition, MCI asserts that one of the technical publications referenced by NYNEX precludes provision of ATP. *Id.* Finally, MCI criticizes the lack of discussion regarding maintenance of the lines used to provide 64 CCC service in NYNEX's technical publications. *Id.* at 4.

3. NYNEX filed its reply on October 5, 1992. NYNEX responds that the ISDN D-channel is used in local exchange service, while 64 CCC is a trunkside service unrelated to the D-channel. NYNEX Reply at 2-3. NYNEX also contends that the technical publications cited by MCI are unrelated to 64 CCC service. *Id.* at 3. Finally, NYNEX denies that performance and maintenance specifications are not set forth in any of its technical publications. *Id.* at 3.

4. The Common Carrier Bureau has reviewed NYNEX's Transmittal 117 and all associated pleadings and submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition for rejection or suspension and investigation filed by MCI Telecommunications, Inc., against NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 117, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] On October 15, 1992, NYNEX filed its Transmittal No. 124, in order to clarify in its tariff that the non-recurring charge for equipping an existing FGD trunk with 64 CCC would be one-half the Local Transport non-recurring charge.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Telephone Operating Companies — Transmittal No. 734

Tariff F.C.C. No. 1

ORDER

Adopted: October 23, 1992; Released: October 23, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. By this transmittal, the GTE Telephone Operating Companies (GTE) reduces certain special access rates for services provided by GTE California, GTE Florida, GTE Hawaii, GTE Northwest, GTE South and GTE Southwest. GTE Southwest is proposing within band rate adjustments. The rate adjustments proposed by the remaining GTE Operating Companies are below band. GTE estimates that the price cap indices associated with most of its below band adjustments are no more than 10 percentage points below band, except: (1) the California Voice Grade band which GTE asserts will fall 16 points below the current service band limits; and (2) the High Capacity/DDS and the DS-1 Service bands for California, Florida, Oregon/Washington/West Coast-California, which GTE states will fall 15 and 21 points below band, respectively. Transmittal 734 Description and Justification (D&J) at 1.

2. The Association for Local Telecommunications Services (ALTS) filed a petition to reject, or alternatively, suspend and investigate GTE's below-band special access rates, arguing generally that the materials filed in support of those rates fail to demonstrate recovery of average variable costs (AVC) in violation of the Commission's price cap rules.[1] ALTS Petition at 1-2.

3. In particular, ALTS charges that GTE failed to provide cost data adequate to determine the AVC of the services at issue. ALTS Petition at 2, 5. ALTS also complains that GTE excludes whole categories of variable costs: marketing, order processing, billing and collection and spare equipment. ALTS Petition at 5. ALTS further argues that GTE provided no discussion of the methods and assumptions it used in deriving its purported AVC data, no explanation of how costs computed on a monthly basis were derived, or whether a one-month time-frame is an appropriate measure of AVC. *Id.* at 6. ALTS claims that costs should be averaged over the most recent five-year period in order to obtain a realistic approximation of a LEC's AVC. *Id.*

4. In reply, GTE asserts that Exhibit 1 of its D&J shows, by rate element, that each proposed monthly rate exceeds the average variable cost.[2] Specifically, GTE states, both dollar and percentage differences are displayed, and the Investment and Cost Data Summary shows, by rate element, how the monthly average variable cost was calculated. GTE Reply at 2. GTE further states that the Investment and Cost Data Detail provides further elaboration of the calculations of the line entries shown on the Investment and Cost Data Summary. *Id.* at 2-3. In addition, GTE asserts that costs associated with order processing are recovered through certain nonrecurring charges. GTE contends that since those non recurring charges were not changed in the transmittal, no cost support for these charges was provided. *Id.* at 4-5. GTE also asserts that the costs of spare equipment are recovered through the maintenance and depreciation annual charge factors. *Id.* at 5.

5. Finally, GTE maintains, the "snapshot" approach it used for identifying variable costs[3] is reasonable and acceptable, and that costs were reflected on a monthly basis to match the proposed special access monthly charging period. *Id.* GTE concludes that no legal or academic precedent exists for ALTS' recommended five-year study. *Id.* at 6. Thus, GTE believes, it adequately supported the below-band rate reductions proposed with the required average variable cost showing. *Id.*

6. ALTS also complains that the instant rate reductions would effect proportionately larger reductions for long term commitments for DS1 service than for month-to-month DS1 rates, thereby increasing the discount from the current maximum of 28 percent to a maximum of 36 percent. ALTS Petition at 7-8. ALTS contends that LEC term discounts have never been cost justified and are likely set at discriminatory and predatory levels. *Id.* at 8. Because the instant below-band reductions would exacerbate these "already questionable" discounts, ALTS maintains, they cannot be allowed to take effect. *Id.*

7. GTE responds that term discounts have been in effect for some time, and that the proposed or anticipated decisions of the Commission have no bearing upon current filings. Thus, GTE concludes, a suspension of filed rates based on future expected events is neither justified nor productive. GTE Reply at 8.

8. The Common Carrier Bureau has reviewed GTE Transmittal No. 734 and the related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

9. Accordingly, IT IS ORDERED that the petition to reject, or alternatively, suspend and investigate GTE Tariff F.C.C. No. 1, Transmittal No. 734, filed by ALTS, IS DENIED.

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[1] Below band filings must be accompanied by a showing that the rates will cover average variable costs, and are otherwise just, reasonable and nondiscriminatory. *See* Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd, 6786, 6814 and 6824 (1990); and Policy and Rules Concerning Rates for Dominant Carriers, Order on Reconsideration, 6 FCC Rcd 2637, 2699 (1991).

[2] GTE provided its billing and collection costs for the special access service revisions contained in this transmittal in materials submitted October 22, 1992.

[3] GTE defines this approach as an analysis of cost structure and level on a "present day/present time" basis.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-6

In the Matter of

Amendment of Part 22 of the Commission's rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules

THIRD REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: October 14, 1992; Released: November 4, 1992

By the Commission:

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I. INTRODUCTION

1. In this document, we amend the rules governing the licensing of stations in the Domestic Public Cellular Radio Telecommunications Service in several respects. First, we provide a separate method for calculating service areas in the Gulf of Mexico Statistical Area (GMSA). Second, we limit the consideration that an applicant or a petitioner may receive for agreeing to withdraw a mutually exclusive cellular radio application, or a pleading, or for refraining from filing a pleading against a cellular radio application. Third, we adopt prohibitions against alienating ownership interests in applications for unserved areas. These prohibitions are identical to those contained in Section 22.922 of the Commission's rules concerning ownership interests in Rural Service Area (RSA) applications. Further, this Order disposes of ten petitions for reconsideration[1] of our *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185 (1991) (*First Report*), in this docket concerning the acceptance, processing, and granting of applications for unserved areas.[2]

II. BACKGROUND

2. Initial licensees for the Metropolitan Statistical Areas (MSAs) and RSAs have a five-year "fill-in" period during which they may expand their systems within their markets free from the filing of competing applications.[3] In our *First Report*, we established rules and procedures for accepting, processing, and granting applications to operate new cellular systems in areas as yet unserved on expiration of the five-year "fill-in" period. On the same day that we adopted the *First Report*, we also adopted a *Further Notice of Proposed Rule Making* in CC Docket No. 90-6, 6 FCC Rcd 6158 (1991) (*Further Notice*), requesting comment on several additional proposals. Specifically, we proposed to adopt rules to use a mathematical formula to determine the boundaries of Cellular Geographic Service Areas (CGSAs) that would more closely approximate actual service to the public; to determine appropriate methods for calculating service provided over the GMSA and water areas included in other markets; to allow licensees to expand their CGSAs within their markets without prior Commission authorization (*i.e.*, by notification); to limit the consideration that an applicant or a party could receive for agreeing to withdraw a mutually exclusive cellular application or a pleading, or to refrain from filing a pleading against a cellular application, to the legitimate and prudent expenses of the withdrawing applicant, petitioner, or would-be petitioner; and to prohibit the alienation of all ownership interests in applications for unserved areas.

3. On April 9, 1992, we released our *Second Report and Order* in CC Docket No. 90-6, 7 FCC Rcd 2449 (*Second Report*). The *Second Report* adopted rules to determine CGSAs by the use of a mathematical formula and modified the authorizations of existing cellular systems to redefine the boundaries of their CGSAs in accordance with the new standard. The *Second Report* also amended the rules to allow licensees to expand their CGSAs within their mar-

kets during the five-year fill-in period without prior authorization. Instead of filing applications for authorization of such expansions as was previously required,[4] licensees are now required only to notify the Commission of the added or modified cells, using FCC Form 489. The foregoing matters were acted upon expeditiously so that existing licensees and potential applicants for unserved areas would know which areas in existing markets were considered to be "unserved" under the new method for determining CGSA boundaries.[5] The remaining issues resolved by this *Third Report and Order* are: (1) whether to adopt new methods for calculating service provided in the GMSA and over water areas in other markets; (2) whether to limit the consideration that an applicant or a party may receive for agreeing to withdraw a mutually exclusive cellular application or a pleading, or to refrain from filing a pleading against a cellular application; and (3) whether to prohibit the alienation of any ownership interest in an application for an unserved area.[6]

III. THIRD REPORT AND ORDER

A. Determination of CGSAs in the Gulf of Mexico MSA

4. In the *Further Notice*, we proposed that the CGSAs of cellular systems in the Gulf of Mexico MSA (GMSA) be determined by use of a mathematical formula slightly different from the one we proposed, and have adopted in the *Second Report*, for use in all other areas.[7] In doing so, we recognized that the field strength of electromagnetic radio waves when propagating over large bodies of water is attenuated less than when their path is over rolling terrain, such as contemplated by the Carey Report. However, we did not have measurement data or field experience for cellular service over water, and we did not have information as to the characteristics of a typical cellular mobile station for a GMSA subscriber. Therefore, we invited comment on these questions and specifically on whether the proposed formula approximates actual cellular coverage in the Gulf.

5. Both of the GMSA cellular licensees, Petroleum Communications, Inc. (Petrocom) and RVC Services, Inc. dba Coastel Communications Company (Coastel), submitted comments addressing the proposed formula for cellular service in the GMSA.[8] Some of the other parties also commented on the proposed formula for the Gulf, and a few suggested alternative formulas.[9] In general, the commenters agree that a formula should be used for determining service areas in the GMSA. Petrocom's comments include a technical exhibit that contains a review of relevant propagation theory, measured field strength data taken under typical conditions, and analysis of these data. This analysis concludes that the constant factor in the proposed formula should be changed from 1.65 to 3.0, in order for the formula to reflect accurately the actual coverage. Petrocom's conclusion is based on the field strengths it measured from two cell sites[10] using what it considers to be a typical mobile station for a GMSA subscriber.[11]

6. We find that Petrocom's technical exhibit provides a reasonable and convincing demonstration of the service range of typical cellular facilities in the Gulf of Mexico. Accordingly, we adopt the proposed GMSA formula with the constant changed to 3.00, as suggested by Petrocom.[12] We believe that this formula provides representations of actual coverage that are sufficiently accurate to determine the CGSAs of GMSA systems for licensing purposes. The GMSA formula will be used for GMSA cellular systems only. It will not be used to determine coverage of cellular systems in other MSAs or RSAs even if such systems provide some coverage in the Gulf of Mexico. The rule limiting the minimum values of antenna height and effective radiated power that may be used in the formula for all other markets will also apply to the GMSA formula. However, because the GMSA formula is not based on the Carey Report, and the "terrain roughness" over water is zero, the rationale that we set forth in the *Second Report* for a 100 foot minimum antenna height does not apply to offshore sites and a lower minimum may be used. As a practical matter, we set the minimum height value for such sites at 25 feet above sea level (or mean sea level, as appropriate for the support structure).[13]

7. In the *Second Report*, we adopted a rule providing for consideration of the use of alternative coverage showings (in lieu of the formula) to determine the CGSA in two circumstances: (1) if microcells are involved along the CGSA boundary, or (2) if the CGSA determined using an alternative method differs substantially from that determined using the formula because of local terrain roughness or features. Neither of these circumstances is applicable to the GMSA. Radio wave propagation over bodies of water is occasionally affected by weather conditions; however, these effects are ephemeral and do not warrant adjustments in the CGSA. Accordingly, the alternative coverage showing rule[14] will not apply to the GMSA formula.

8. Petrocom also requests that the Commission establish 28 dBu as the median field strength defining reliable cellular service in the GMSA.[15] We deny this request and do not specify any particular median field strength to define reliable cellular service in the GMSA. Instead, cellular service areas in the GMSA will be specified in the same manner we established in the *Second Report* for all other markets, *viz.*, in terms of the distance from each cell site to its service area boundary along cardinal radials, and not as the area within any particular field strength contour.[16]

9. In light of the foregoing, the two GMSA licensees, Petrocom and Coastel, must use the formula for determining CGSAs in the Gulf of Mexico MSA which we are adopting herein. The CGSAs of those licensees are modified to conform to the new CGSA determination method adopted herein, effective 60 days after publication of the new rules in the Federal Register. In this regard, we dismiss as moot Petrocom's application (File No. 06360-CL-MP-90) requesting authority to make its CGSA coterminous with the entire United States Gulf of Mexico coastline and water territory in the Florida Keys and the Atlantic Ocean. Further, because the five-year fill-in periods for Petrocom and Coastel have expired, we shall issue Public Notices in the near future announcing the dates for filing the required system information updates for the GMSA licensees and for filing unserved area applications in the GMSA.

B. Service Area Boundary Determinations over Water Areas other than the Gulf of Mexico

10. In the *Further Notice*, we proposed to include extensions of service area boundaries into water areas[17] as part of the CGSAs of the systems providing those extensions, if reliable service is being provided in those water areas.[18] Two parties stated that the formula we proposed for average terrain, and which we adopted in the *Second Report*, should be used to calculate the distance to the service area boundary over bodies of water as well.[19] They argue that a

requirement to select and use the appropriate formula for each cell radial, depending upon whether the radial extends over land or water, would be unnecessarily complicated and burdensome. They note that most radials that extend over water also extend over land, raising the question of which formula to use or whether to use some combination of the two. Using the formula for average terrain in all situations, they assert, would be more workable. Another commenter, Rochester Telephone Mobile Communications (Rochester), suggests that the Commission employ a case by case approach, using the GMSA formula as a starting point. Rochester also recommends that the Commission decline to recognize a water-only territory as an unserved area.[20]

11. We are persuaded by these comments to maintain the current rule, which provides that the service area for all cellular systems other than those authorized to serve the GMSA be calculated using the formula we adopted in the *Second Report*, regardless of whether the area is over land or water. The use of one formula will avoid unnecessary complexity in our application processing, and will not affect the availability of cellular service to the public in coastal waters.

12. We also adopt Rochester's suggestion that unserved area applications proposing cellular systems to serve water-only areas be considered unacceptable for filing.[21] We believe that because of the lack of population, water-only cellular systems in areas other than the GMSA are unlikely to be economically viable. Furthermore, the authorization of such systems in some cases (*e.g.*, the Great Lakes), would complicate domestic and international frequency coordination for the adjacent land-based carriers. The most likely purpose to seeking authorization for such a system would be to sell it later to the adjacent land-based carrier.[22] We have previously found that trafficking in cellular authorizations does not serve the public interest.[23] Accordingly, the public interest will be better served if we establish that cellular service in water areas other than the GMSA may be provided only by expansion of the adjacent land-based systems. The majority of the commenters in this proceeding support this position.

C. Withdrawal of Applications and Pleadings

13. In our *Further Notice*, we proposed to limit the consideration that an applicant or a petitioner could receive for agreeing to withdraw a mutually exclusive cellular application or a petition to deny or to refrain from filing a petition or informal objection against a cellular application to the legitimate and prudent expenses of the withdrawing applicant, petitioner, or would-be petitioner. We proposed these limitations on payments made to applicants and petitioners to prevent the filing of speculative applications and litigious pleadings, which are designed to extract money from sincere applicants or delay the grant of a legitimate application and thus force a settlement. The overwhelming majority of parties commenting on these proposals expressed their support for such limitations. Applicants Against Lottery Abuses (AALA), which is a group of non-wireline cellular licensees in RSA markets formed to prevent abuses of the Commission's processes, was the only commenter who recommended that we not adopt "blanket" limitations (*i.e.*, limitations applicable to all withdrawing applicants and petitioners) on payments to petitioners and applicants. AALA recommends instead that we require withdrawing petitioners and applicants to submit settlement agreements to the Commission for approval, but that the Commission should determine on a case-by-case basis whether the agreement should be approved. AALA argues that limiting all settlements to legitimate and prudent expenses will provide no significant incentive for "private attorneys general" to file meritorious petitions to deny or participate in hearings. AALA also suggests that limiting payments to withdrawing applicants might discourage unqualified applicants from withdrawing from hearings.

14. PacTel Cellular (PacTel) favors restrictions on payments to petitioners, but not on payments to withdrawing applicants who are paid as part of full-market settlements. Rochester Telephone Mobile Communications (Rochester) recommends adopting the proposed limitations on payments made to applicants, but suggests that no payments be made to withdrawing petitioners because, *inter alia*, petitioners should be willing to take the minimal economic risk necessary to file pleadings. Committee argues that we should strengthen and extend our proposed prohibitions against abusive filings to cover all adverse pleadings, not just petitions to deny. Thus, Committee recommends that our proposed limitations on payments allowed to withdrawing petitioners or parties who refrain from filing petitions to deny or informal objections be extended to include payments made for withdrawing or refraining from filing petitions for reconsideration, applications for review, and other adverse pleadings.

15. The purpose of our proposed rules is to prevent the filing of speculative applications and unwarranted pleadings, which are designed to extract money from sincere applicants, while providing some incentive to legitimate petitioners and applicants to withdraw from proceedings and thus expedite service to the public. We believe that AALA's proposal not to limit payments could encourage "greenmail" (*i.e.*, pay-offs exceeding legitimate and prudent expenses) and also would be administratively burdensome. On the other hand, we reject Rochester's idea of not allowing parties filing pleadings to recover their legitimate and prudent expenses incurred in preparing such pleadings. Our proposed rule concerning payments for the withdrawal of pleadings will give the kind of reasonable encouragement which legitimate petitioners might need to raise issues affecting the public interest in particular proceedings without allowing "greenmail" (*i.e.*, excessive pay-offs).

16. As to PacTel's argument that applicants withdrawing as part of full-market settlements should be permitted to receive more than their legitimate and prudent expenses, we observe that even our rules concerning settlements between mutually exclusive applicants for broadcast stations do not allow withdrawing applicants to receive more than their legitimate and prudent expenses. *See* Section 73.3525 of the rules. The foregoing rule applies to broadcast applicants for AM, FM, and TV facilities who undergo comparative hearings, which results in considerable expense for the applicants and the Commission. In contrast, cellular applications in unserved areas which are mutually exclusive will undergo lotteries, which entail no hearing expenses. Thus, it does not appear that the public interest would be served by allowing mutually exclusive cellular applicants to receive more than their legitimate and prudent expenses for withdrawing their applications. In brief, we will adopt our proposed rules placing limits on payments made to withdrawing applicants, petitioners, informal objectors, and would-be petitioners. We agree with Committee that these limits should also apply to payments made to adverse parties who file or refrain from filing

other adverse pleadings against mutually exclusive applicants (who now would be licensees), such as petitions for reconsideration, applications for review, petitions to revoke licenses, and any other similar pleading. If these additional pleadings are not included in the rules, an adverse party could wait until the petition for reconsideration period to try to extract substantial payments from *bona fide* applicants. We consider these pleadings to be similar in scope to the filing of a petition to deny with the intent of receiving payments and, accordingly, we are restricting the payments that adverse parties could extract from the filing of these pleadings. We anticipate that these rules will discourage the filing of speculative applications and litigious pleadings designed to extract money from sincere applicants. They also will provide some incentives to applicants and parties filing pleadings to expedite the termination of litigation.

17. Lastly, because we are adopting Sections 22.927 and 22.929 of the rules which limit payments to all parties filing pleadings or refraining from filing pleadings against cellular radio applications to the legitimate and prudent expenses incurred by the withdrawing parties, we are removing Sections 22.944 and 22.945 of the rules as duplicative. The latter rules impose the foregoing payment limits on parties filing pleadings or refraining from filing petitions with respect to cellular renewal applications.

D. Considerations Involving Transfers of Applications

18. In our *Further Notice*, we proposed adopting prohibitions against alienating ownership interests in applications for unserved areas identical to those contained in Section 22.922 of the rules[24] concerning RSA applications. We sought to impose these prohibitions in order to minimize speculation in unserved areas applications and to facilitate application processing and thus eliminate any unnecessary delays in the implementation of service to the public. Those parties commenting on this proposal favored it. Accordingly, we are adopting our proposal. Any changes adopted for Section 22.922 in our rule making concerning this rule in *Amendment of Section 22.922 (NPRM)*, 5 FCC Rcd 3265 (1990), will apply to unserved area applications as well. *See* new Section 22.922(b) of the rules.

IV. PETITIONS FOR RECONSIDERATION

A. APPLICATION CONTENT AND FILING

1. Transfers of Control and Financial Showings

19. The *First Report* adopted a new Section 22.920(c) which states that an authorization for an unserved area cannot be transferred or assigned until the licensee has provided service to the public for one year. In an effort to clarify the meaning of Section 22.920(c)(1), footnote 40 of the *First Report* states that licensees may not enter into option agreements or management contracts or any other agreement whereby the licensee agrees to transfer any portion of the system before the completion of one year of operations, even if the actual transfer will take place after the first year of operations. Several petitioners, including Fisher, Wayland, Cooper and Leader (Fisher), Brown, Finn & Nietert (Brown) and New Par, claim that the language of footnote 40 could be read to prohibit the use of standard loan security documents during the first year of operation, because such documents can be construed to transfer, upon default, the system, subject to Commission approval. In this regard, the petitioners note that lender collateral for cellular systems frequently consists of the tangible assets of the system and the stock of the permittee. Petitioners request that we clarify footnote 40 to explain that finance security agreements covering system equipment and stock ownership of a permittee/licensee are not prohibited by Section 22.920(c) of the rules.

20. Section 22.920(c) was not intended to prohibit cellular licensees from using their equipment assets or ownership interests as collateral for loans. Only if a creditor has a security interest in sufficient stock of the licensee to constitute control of a cellular radio licensee and then decides to foreclose on that interest would the creditor have to first seek this Commission's approval before invoking that interest.

21. Fisher, Brown, New Par, and the Committee for Effective Cellular Rules (Committee) request that we overturn the policy contained in footnote 41 of the *First Report* which states that if an involuntary transfer of control or assignment of a license for an unserved area occurs within the first year of operation, the license will be forfeited. The petitioners claim that this policy would make financing institutions much more hesitant to lend money to a cellular system licensee because of the greater uncertainty placed on the value of the system's assets, which could be used as collateral. We disagree. Lending institutions evaluating a proposed cellular system must contemplate a panoply of risks, as they would for any other business venture. Nonetheless, because we believe that death or incapacity of the controlling party would warrant a permissible involuntary transfer, we amend Section 22.920 of the rules to allow for these exceptions to our general prohibition.

22. Lastly, several petitioners request that we change the wording of Section 22.917(f)(3)(v) concerning the financial qualifications of applicants for unserved areas. The rule states that if an applicant is relying on a firm financial commitment to demonstrate its ability to construct and operate its system for one year, the lender must state "that the commitment is not in any way guaranteed by any entity other than the applicant." The petitioners ask that the foregoing rule section be reworded to allow principals, shareholders, or other owners of applicants to guarantee such commitments, lest the current wording be construed to allow only the applicant itself to serve as a loan guarantor. The petitioners observe that in the case of a small or minimally capitalized applicant, normal banking practices require that the applicant's owners agree to guarantee the loans.

23. The rule section is designed to prevent parties unrelated to the applicant from guaranteeing loans to applicants which are not financially qualified to be Commission licensees. Thus, principals, stockholders, parent companies and other owners of the applicant may guarantee loans to the applicant. We find no need to alter the wording of this section, given this construction of the rule.

2. Maps

24. Cellular Communications Holdings, Inc. (CCH) requests clarification of new rule Sections 22.925 and 22.926, which require licensees submitting updated system maps and maps included with cellular applications to use a map scale of 1:250,000. CCH asserts that the U.S. Geological Survey (USGS) maps for Puerto Rico are not available in that scale, but are available on a 1:240,000 scale. CCH requests that we clarify that where USGS 1:250,000 scale

maps are not available, licensees may submit 1:240,000 scale maps or maps of the closest scale available to that required by the rules. In the past, we have always allowed applicants for Puerto Rico markets to utilize maps which were close to the USGS scale since a 1:250,000 scale map is not available. Applicants filing applications for areas for which there are no USGS maps of the proper scale should request a waiver of our rules to utilize maps on scales which are as close as possible to the proper scale and to file such maps with their waiver requests. We anticipate granting such waivers, as we have in the past. If we grant an application requesting such a waiver, grant of the application constitutes grant of the waiver request.

25. New Par requests that licensees be permitted to submit maps pursuant to Section 22.925 which do not identify each reliable service contour or cell site location if that information cannot be provided legibly. Thus, New Par asks that we require licensees to depict only their CGSAs and composite reliable service contours on their maps. Paragraph 11 of our *Second Report* has already granted New Par's request to the extent feasible. Thus, the *Second Report* requires that the CGSA boundary and cell sites be plotted, but, as stated in paragraph 11 of that Order, "Service area boundaries of individual cells that do not constitute a portion of the CGSA boundary need not be plotted."

26. For its part, Committee asserts that due process of law requires that we establish procedures by which interested parties will be afforded a meaningful opportunity to question the accuracy of system informational update filings, particularly current maps, required by Sections 22.925 and 22.926 of the rules.[25] Thus, Committee suggests that interested parties be given 30 days after the filing of a system informational update for a particular market to file a petition against the update, and that filing such a petition should automatically defer the filing of initial unserved area applications for that market until the Commission acts upon the petition.[26]

27. McCaw and New Par claim that Committee's proposal could encourage frivolous challenges to system updates and thus produce delays in the dates set for filing unserved areas applications. New Par suggests that if a potential unserved area applicant disagrees with information contained in a licensee's system update filing, that party should file its application consistent with the established filing windows. If the Commission finds that the licensee has misstated its service area, New Par continues, unserved area applicants could be permitted to amend their applications. New Par also suggests that if a service area is overstated in such a manner that non-adjacent applicants would be prohibited from filing unserved area applications pursuant to Section 22.924(a) of the rules (*i.e.*, a licensee's claimed CGSA would result in an unserved area less than the minimum 50 square miles required), challengers could file applications conditioned upon revision of the licensee's claimed CGSA.

28. We agree that Committee's proposal would delay unnecessarily the processing of many applications for unserved areas and create unnecessary additional litigation. Moreover, the maps required to be filed pursuant to Sections 22.925 and 22.926 do not create or eliminate rights for existing licensees or unserved area applicants. The only requirement is that licensees pictorially depict their authorized service areas to facilitate the filing process for unserved areas. As we stated in the *Second Report and Order*, 7 FCC Rcd at 2454, "the position of the GCSA boundaries will be officially determined by the geographical coordinates of cell sites and the authorized distances from these cell sites contained in the Commission's station files." These maps will not involve modifications of the licensees' systems and will not require any Commission action since they are not going to be granted or denied, therefore due process of law does not require that we establish a 30 day period for petitions to deny. Furthermore, since the maps represent only what has already been authorized, interested parties have already had due process rights to petition to deny the original application and any previous modifications in accordance with Section 309 of the Communications Act. We expect that licensees will accurately depict their CGSAs and that errors will be the exception and not the rule. Additionally, we believe that intentional misrepresentations of the CGSAs can be sanctioned through appropriate enforcement actions. Therefore, we will not create additional delays to the filing of unserved area applications. Unserved area applicants who believe that reported adjacent CGSAs are in error or have been misdepicted may file applications, pursuant to the requirements in the unserved area rules, for areas they believe constitute 50 square miles and state in their applications why they disagree with the depictions or representations of adjacent CGSAs. Such applications must be filed under Phase I or Phase II procedures, as appropriate. Once such an applicant has become a tentative selectee, if it has made a *prima facie* case that an adjacent licensee has misdepicted its CGSA, that licensee will have the burden of responding to any relevant allegations concerning the licensee's depiction of its CGSA, and the Commission will resolve the dispute. This procedure will result in the least delay to our licensing of unserved areas, especially in Phase I where all applicants for unserved areas in the same frequency block in the same MSA or RSA will participate in a lottery, while protecting all parties' rights. Other parties in interest aggrieved by a licensee's depiction of its CGSA may informally request Commission action to correct the maps under Section 1.41 of the rules, since the information necessary to resolve the dispute is contained in our files.

3. Filing Location and Copies

29. The Law Office of Dean George Hill and Welch has filed a "Request for Clarification" in which it asks whether unserved area cellular applications will be accepted under the "special procedure" allowing applicants who file official copies of their applications at the Commission's Pittsburgh, Pennsylvania, lockbox bank to file unofficial copies of those applications at the Commission's Washington, D.C., office. *See Memorandum Opinion and Order*, Gen. Docket No. 86-285, 5 FCC Rcd 3558, 3564-65 (1990) (special procedure made available for applications originally required to be filed in Washington and then required to be filed in Pittsburgh, because of possible "disruptions" which might occur due to the switch in location.) The "special procedure" allows an application filed on the due date with an overnight courier service to be considered as being timely filed even if it arrives at the Pittsburgh destination on the next day or later. The foregoing procedure allows the applicant in question to file an unofficial copy of its application at the Commission's Washington, D.C. office to be date stamped and retained by the Secretary's office. Certain applications, like RSA cellular applications, which have always been submitted to Pittsburgh, were not perceived as being in need of the special procedure.

30. In paragraph 17 of our *Second Report*, 7 FCC Rcd 2449, 2457 (1992), we explained that the foregoing special procedure will not be available for unserved area applications in either Phase I or Phase II. Thus, applications for authority to construct and operate new cellular systems in unserved areas must be filed at the Commission's lockbox bank in Pittsburgh, Pennsylvania. We utilized the same procedure for the 288,000 cellular applications for RSAs. Although we do not know precisely how many applications we will receive for unserved areas, our recent experience with RSAs suggests a large response. Thus, in addition to being unnecessary, utilizing the "special procedure" could impose a considerable burden on our already limited resources in Washington, D.C.

31. New Section 22.6(d)(3)(iv) of the rules requires all applicants for unserved areas to serve copies of their applications on licensees for the same frequency block of any adjacent systems whose CGSA, MSA, or RSA boundaries are within 50 miles of the boundaries of the proposed system. Fisher and Brown propose that during Phase I of our licensing of unserved areas only lottery winners be required to serve adjacent market licensees with copies of their applications, while retaining that requirement for Phase II applicants.[27] We reject Fisher and Brown's proposal. Licensees receiving copies of Phase I applications might have legitimate objections to applications filed for nearby unserved areas, including compliance with relevant Commission rules such as the provision of service to a minimum geographical area of 50 square miles. *See* Section 22.924(a)(1). The public interest will be furthered by the earliest possible disclosure of potential violations of Commission rules. Requiring the filing of copies of applications with licensees who might be affected by unserved areas proposals would impose an insignificant burden on the Commission, licensees, and applicants. We note that existing licensees have not objected to this requirement.

B. PROCEDURES FOR PROCESSING UNSERVED AREAS APPLICATIONS

1. Definition of Minimum Size of Unserved Area

32. Section 22.924(a)(1) of the rules states that applications for unserved areas must propose a minimum geographical coverage of 50 contiguous square miles. An exception to this general rule is that existing licensees do not need to meet this requirement if they are proposing to serve an area contiguous to an existing system. *See* Section 22.924(a)(2). We established a minimum geographical coverage requirement for applications for unserved areas in order to deter speculative applications. *See* paragraph 34 of the *First Report*. The minimum area of 50 square miles was selected as the appropriate standard because "50 square miles is generally the minimum coverage necessary to ensure a viable stand-alone system." *Id.*, footnote omitted. We did not require existing licensees to meet minimum coverage requirements if they are proposing to serve an area contiguous to an existing system because we had no reason to believe existing licensees would file speculative applications. Moreover, an area of less than 50 square miles is likely to be a viable proposal if it will be part of a larger cellular radio system. *Id.*

33. BellSouth Corporation (BellSouth) and U S WEST NewVector Group, Inc. (NewVector) argue that if the Commission adopts a mathematical formula for determining the area in which reliable cellular service is provided, as we have in the *Second Report and Order*, the minimum coverage requirements for applicants for unserved areas should be changed to reflect a cellular system's composite 32 dBu contours under that formula. The petitioners assume that, because reliable service has been defined by 39 dBu contours in the past, the 50 square mile area specified in Section 22.924 was an area defined by the 39 dBu contours of a facility using 10 watts effective radiated power (ERP) and utilizing an omnidirectional antenna with a height above average terrain (HAAT) of 100 feet. The petitioners assert that, for those facilities, the area encompassed by 32 dBu contours, pursuant to the *Second Report and Order*, is about 175 square miles and therefore the new minimum coverage requirement for unserved areas applicants should be about 175 square miles.

34. Applying the relevant median field strength curves in the Carey Report,[28] the 39 dBu contours of a facility using 10 watts ERP and an omnidirectional antenna with HAAT of 100 feet would encompass a service area of about 100 square miles, not 50 square miles. More significantly, however, the 50 square mile standard created by our *First Report* attempted to define an area which would constitute an economically viable stand-alone system regardless of the antenna height or ERP utilized. We regard 50 square miles as the appropriate standard for defining what constitutes minimum coverage pursuant to Section 22.924(a)(1) and therefore we find no need to change any provisions of Section 22.924(a). In any event, our adoption of a new formula to determine CGSAs does not have any impact on our decision to require the 50 square mile minimum coverage area.

2. Two-Phase Processing Procedures

35. Our *First Report* adopted an application processing scheme that has two phases for all markets in which the five-year fill-in period has expired. In Phase I, cellular radio applications for unserved areas will be considered mutually exclusive if they propose facilities within the same market (MSA or RSA) and are filed within a filing window which occurs on the 31st day after the end of the five-year fill-in period for a particular frequency block or during a filing window set forth in a Public Notice published by the Commission. *See* Section 22.31(a)(1)(ii). Applicants may file one application per market and request one CGSA per application. *See* Section 22.902(b)(4)(i). The winning application among mutually exclusive applications in Phase I will be chosen by lottery.[29] If that application is acceptable for filing, it will be designated as the tentative selectee, placed on public notice and, if fully qualified, granted. On the 121st day after the construction authorization for the tentative selectee is granted, applications for any remaining service areas will be accepted for filing during Phase II on a first come, first served basis. If no applications are filed in Phase I, applications for unserved areas may be filed beginning the day after the end of the filing window for Phase I and will be granted on a first come, first served basis in Phase II. *See* Section 22.6(b)(2). In Phase II, applications are not restricted to service areas entirely contained within one MSA or RSA market. Applicants must file a separate application for each area they propose to serve, limited to one CGSA per application. *See* Section 22.902(b)(4)(ii)(B)(3). In Phase II, applications filed on the same day will be considered to be mutually exclusive if their CGSAs overlap in such a way that a grant of one would preclude the grant of the other application. *See* Section 22.31(a)(1)(ii).

36. Several petitioners have questioned our processing procedures for Phase I. BellSouth and NewVector recommend that we grant any application which proposes a CGSA which does not overlap with the proposed CGSA of any other application in that market, thus allowing potentially more applications to be granted in Phase I. NewVector suggests that all applications in a market which are mutually exclusive with any other application be placed in a lottery, ranked, and processed in the order of ranking. Under this system, the Commission could grant all applications that do not conflict with a higher-ranked application. NewVector objects to allowing the unserved area grantee in Phase I to file an unopposed modification application because speculative applicants would be encouraged to file "generic" applications, observe the most attractive proposals of their competing applicants, and incorporate those attractive proposals in their major modification applications.[30] For its part, Committee argues that we should reverse our decision to restrict Phase I unserved area applications to a single MSA or RSA and instead consider contiguous multi-market unserved areas as a single unserved area during Phase I.

37. As we stated in paragraphs 18 through 20 of our *First Report*, our two-phase processing scheme is a compromise procedure for determining the time period during which applications may be filed and the method of making determinations of mutual exclusivity. Our processing procedures attempt to meet several competing goals which are listed in paragraph 19 of the *First Report*, including our desires to process applications as rapidly as possible in order to expedite service to the public, afford sincere applicants a fair opportunity to participate in the application process, discourage speculators, and encourage realistic and cost-effective engineering proposals. In licensing the RSAs, we made the same assumption we are making in Phase I, namely, that all applications for a given market were mutually exclusive. *See* Section 22.31(a)(1) of the rules. Further, the use of defined boundaries in Phase I was designed to avoid a large number of applicants proposing different overlapping service areas, resulting in "a complex series of interrelated mutually exclusive applications." *See Amendment of the Commission's Rules for Rural Cellular Service*, 60 RR 2d 1029, 1033 n.6 (1982). We are not convinced that the parties offering the foregoing alternative views on this matter have shown that their approaches to serve the public interest are any more effective. Thus, we shall continue to require Phase I applicants to file no more than one application per MSA or RSA market and to request only one CGSA per application.

38. As to NewVector's concern about a Phase I tentative selectee taking advantage of another applicant's more attractive proposal by incorporating that proposal in a major modification application, we observe that the recently adopted rules provide that any new area incorporated by such a tentative selectee must be within the same MSA or RSA, except for the limited situations described in footnote 29, *supra*. Thus, even if NewVector's scenario were to occur, the public would benefit because it would receive service in a large unserved area in a brief period of time, which is one of our chief goals in licensing unserved areas. Further, given our requirements concerning the minimum size of areas for which applicants may apply (see Section 22.924(a) of the rules, *supra)* New Vector's scenario would appear to be relatively improbable.

39. Committee requests that we allow parties to file single applications for unserved areas which are contiguous but contained in adjacent markets. We note that such applications are allowed in Phase II. In Phase II, we will grant applications on a first-come, first-served basis and will only hold lotteries for applications whose CGSAs overlap and are filed on the same day. During Phase I, however, we wish to retain our requirement that applicants be restricted to one market per application in order to simplify and expedite our licensing process.

40. Lastly, NewVector asks that we clarify the meaning of Section 22.902(b)(4)(i) to the extent it limits Phase I applicants to one application per market and one CGSA per application. NewVector requests that we make clear that during Phase I an existing licensee may file an application to expand its existing CGSA in any manner (including expansion in multiple directions or at multiple points) or, in the alternative, apply for a new non-contiguous CGSA in an unserved portion of its market and that either of the applications would be considered to be a single unserved area application. We hereby grant NewVector's request, with one qualification. In our *Second Report*, we ruled that CGSA boundaries are defined by a new mathematical formula which approximates the composite 32 dBu contours of a cellular system. A licensee may expand the CGSA so defined in any manner or propose a new non-contiguous CGSA in an unserved portion of its market. Either proposal would be considered to be a single unserved area application.

3. Contour Extensions

41. Several petitioners have raised questions concerning our policies for allowing applicants for unserved areas to propose *de minimis* extensions and contract extensions of service contours beyond the borders of adjacent MSAs and RSAs during Phase I. There appear to be inconsistencies between the provisions of Sections 22.902(b) and 22.903(f) of the rules as adopted in the *First Report* and between Sections 22.902(b) and 22.903(d)(3)(i) through 22.903(d)(3)(iv) (which replaced Section 22.903(f)), as recently revised in our *Second Report*. We take this opportunity to both modify and clarify our policies in this regard. First, we reiterate that an unserved area application that proposes an extension into the CGSA of any other licensee's cellular system on the same frequency block or into any adjacent MSA or RSA on a frequency block for which the five-year fill-in period has expired will be considered defective. *See* Section 22.903(d)(3)(i) of our rules.[31] Second, we will allow unserved area applicants in Phase II and Phase I licensees filing their sole major modification application to propose *de minimis* and contract extensions into adjacent markets if those extensions comply with the provisions of Sections 22.903(d)(3)(i) through 22.903(d)(3)(iv) of our rules.[32] Nevertheless, initial applications filed in Phase I will not be allowed to propose any extensions into adjacent MSAs or RSAs, even if those extensions are *de minimis* or contract extensions[33] and applications proposing such extensions into adjacent MSAs or RSAs will be dismissed as defective. We will add language to this effect to Section 22.902(b)(4)(i). In addition, we are changing the language of Sections 22.903(d)(3)(ii) through Section 22.903(d)(3)(iv), which were adopted in our *Second Report*, to indicate the new requirements for initial Phase I applications and to distinguish the differences between the requirements for Phase I and Phase II applications. We believe that prohibiting any contour extensions by Phase I

applicants into adjacent markets will simplify and expedite our licensing process and will remove a possible source of litigation as to whether or not such extensions are permissible under our existing policies.

4. Cells Serving More Than One Market

42. In paragraph 115 of our *First Report*, we explained that a single cell could be used to serve more than one market. To implement that policy, we adopted new paragraphs (i) and (ii) to Section 22.903(a)(1) of the rules. Although paragraph (i) stated that a single cell can be used to serve multiple markets, paragraph (ii) contained language which appeared to preclude a cellular applicant or licensee from using the contour of a cell located in one market to meet the geographic coverage requirements for another MSA, RSA, or unserved market. Further, when Section 22.903 was rewritten in our *Second Report*, the foregoing paragraphs concerning service to multiple markets by a single cell were eliminated. We will add new paragraph (e) to Section 22.903 to clarify our policy concerning service to multiple markets by a single cell. Thus, licensees in more than one market can include service from a single cell as part of their CGSAs so long as the cell is licensed to each licensee. For example, while two licensees of adjoining markets may use the same cell to serve their respective markets, a cell located in one market may not be used in determining the CGSA for a different MSA, RSA, or unserved area market unless the cell is licensed in both markets. This dual licensing was always our intent, and the changes we are making will clarify this matter.

43. McCaw has raised a related point concerning service provided pursuant to interim operating authority (IOA). McCaw states that under current Commission practice, coverage provided in a market as a result of an IOA is not included when calculating whether a carrier is covering 75 percent of its CGSA[34] or in determining the protected reliable service area (CGSA). McCaw requests that IOA coverage be included as part of the protected reliable service area (CGSA). The purpose of IOA is to provide service in an area not likely to be licensed for an extended period and is issued only to an adjacent area licensee. The IOA authorization is not intended to be permanent. There is no justification, therefore, for including IOA areas in any licensee's CGSA. Nevertheless, if the IOA licensee reaches an agreement with the permanent licensee in the RSA being served under IOA and the agreement states that the IOA licensee will continue to provide service to the RSA from a cell in an adjacent market, the two licensees may file applications requesting that the cell be licensed to both licensees.

5. Consolidation of CGSAs

44. In paragraph 117 of our *First Report*, we explained that a licensee could request consolidation between an existing CGSA and a new CGSA in the same application proposing the new CGSA, if the two CGSAs are in the same market. Without such a procedure, existing licensees who received an authorization for an adjoining CGSA would be forced to file a separate application requesting consolidation, which would entail a needless expenditure of time by both the licensee and the Commission.[35] BellSouth asks whether this procedure is intended to apply in the context of unserved areas and whether such requests will be accepted in Phase I applications for unserved areas. The answer is affirmative. BellSouth also asks whether the foregoing procedure is available where the CGSAs in question are in more than one market. Again, we believe it should be. We currently allow CGSAs for adjacent markets to be consolidated, although the call signs and systems involved will remain separately licensed. Lastly, New Par requests that we allow licensees to propose one or more new or expanded CGSAs and in the same application combine those CGSAs with a single or consolidated CGSA in adjacent markets. We cannot grant this request because our filing procedures for unserved areas do not allow an applicant to request more than one CGSA per application in either Phase I or Phase II. *See* Section 22.902(b)(4).

V. CONCLUSION

45. We have amended our cellular radio rules to provide a separate method for calculating service in the Gulf of Mexico MSA. We have imposed limits on the consideration that an applicant or a petitioner may receive for agreeing to withdraw a mutually exclusive cellular radio application or a pleading or for refraining from filing a pleading against a cellular radio application. We have also adopted prohibitions against alienating ownership interests in applications for unserved areas. In addition, we have considered ten petitions for reconsideration of our *First Report* in this docket and clarified our recently adopted rules concerning the filing and processing of cellular radio applications for unserved areas. The Final Regulatory Flexibility Analysis is contained in Appendix C to this Order.

VI. ORDERING CLAUSES

46. Authority for the rule changes adopted herein is contained in Sections 1, 4(i), 4(j), and 303(r) of the Communications Act of 1934, 47 U.S.C. Sections 151, 154(i), 154(j), 303(r).

47. Accordingly, IT IS ORDERED that Part 22 of the Commission's rules IS HEREBY AMENDED as discussed herein and as shown in Appendix B below.

48. IT IS FURTHER ORDERED that the rule changes made herein WILL BECOME EFFECTIVE sixty (60) days after publication in the Federal Register.

49. IT IS FURTHER ORDERED that the dates for filing updated system information for cellular systems licensed to serve the Gulf of Mexico Statistical Area and for filing unserved area applications in the Gulf of Mexico Statistical Area WILL BE ANNOUNCED in future Public Notices.

50. IT IS FURTHER ORDERED that the Cellular Geographic Service Areas of the authorized cellular systems in the Gulf of Mexico Statistical Area ARE MODIFIED as necessary to conform to the new Cellular Geographic Statistical Area determination adopted herein, effective 60 days after publication of these rule changes in the Federal Register.

51. IT IS FURTHER ORDERED that the application (File No. 06360-CL-MP-90) of Petroleum Communications, Inc., IS DISMISSED as moot.

52. IT IS FURTHER ORDERED that Louisiana CGSA, Inc., which is the wireline licensee in the New Orleans, Louisiana MSA, IS AFFORDED 259 days after the date this order is released to construct cellular facilities pursuant to our fill-in rule that provide service for any area encompassed by the boundaries of the service areas proposed by the applications filed by New Orleans CGSA, Inc. and La Star Cellular Telephone Company in the comparative hearing conducted in CC Docket No 90-257, which

boundaries will be calculated pursuant to the new formula adopted in our *Second Report and Order in CC Docket No. 90-6*, 7 FCC Rcd 2449 (1992), and contained in Section 22.903 of our rules.

53. IT IS FURTHER ORDERED that the petitions for reconsideration of our *First Report and Order and Memorandum Opinion and Order on Reconsideration* in this docket, 6 FCC Rcd 6185 (1991), ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Petitions or requests for reconsideration or clarification were filed by Ameritech Mobile Communications, Inc.; BellSouth Corporation (BellSouth); Brown, Finn & Nietert, Chartered; the Committee for Effective Cellular Rules (Committee); Cellular Communications Holdings, Inc.; Fisher, Wayland, Cooper and Leader; Law Office of Dean George Hill and Welch; McCaw Cellular Communications, Inc. (McCaw); New Par and U S WEST NewVector Group, Inc. (NewVector). McCaw and Committee have filed opposition pleadings, while New Par filed "Comments Supporting in Part and Opposing in Part Petitions for Reconsideration." BellSouth, Committee, McCaw, and NewVector have filed reply pleadings.

[2] "Unserved areas" are geographical areas that are not within any Cellular Geographic Service Area (CGSA) on a particular frequency block (A or B).

[3] The fill-in period begins with the date the licensee receives its initial authorization. *See Rules for Rural Cellular Service (Order on Reconsideration of Second Report and Order)*, 4 FCC Rcd 5377, 5379-80 (1989), and Sections 22.31(a)(1)(i) and 22.31(f) of the rules. We are granting one exception to the application of the five-year fill-in rule, to Louisiana CGSA, Inc. (LCI) which is the successor in interest to New Orleans CGSA, Inc. (NOCGSA) as the wireline licensee for the New Orleans, Louisiana MSA. The wireline licensee received its first authorization on July 11, 1983. The proposed service areas of NOCGSA and La Star Cellular Telephone Company (La Star) to serve generally the St. Tammany Parish area were "frozen" from October 27, 1987, until the release of the Commission's Decision in the comparative hearing between NOCGSA and La Star in CC Docket No. 90-257, *La Star Cellular Telephone Company*, 7 FCC Rcd 3762 (1992), which awarded permanent construction authority to LCI. NOCGSA has been precluded since October 27, 1987, from filing any applications for the areas proposed by La Star but not proposed by NOCGSA which were included in the foregoing hearing. Thus, we view the wireline licensee as having about 8.5 months of its five- year fill-in period left to fill in any of those unserved areas. Therefore, we are affording LCI 259 days from the date this order is released to construct cellular facilities pursuant to our fill-in rule that provide service for any area encompassed by the boundaries of the service areas proposed by the applications filed by NOCGSA and La Star in that hearing, which boundaries will be calculated pursuant to the new formula we adopted in our *Second Report and Order in CC Docket No. 90 - 6*, 7 FCC Rcd 2449 (1992).

[4] Such applications for expansion were previously filed using FCC Form 401.

[5] On July 10, 1992, the Commission released an Order, FCC 92-318, postponing the dates for filing updated system information redefining the CGSAs of cellular radio licensees and new cellular applications for unserved areas until future dates to be set by the Chief, Common Carrier Bureau.

[6] Appendix A lists the parties filing comments and reply comments in this proceeding.

[7] *See Further Notice* at 7, paragraph 12. The formula proposed for use in the GMSA was derived from field strength predictions over sea water contained in *Radio Propagation Fundamentals* by Kenneth Bullington, XXXVI Bell System Technical Journal Number 3, 593 (May 1957).

[8] Comments by the Gulf carriers, in large part, argued for changes in Commission policy concerning land-based cell sites and evaluation of *de minimis* extensions between the GMSA and adjacent markets. As Petrocom admits, however, these issues are beyond the scope of this proceeding. *See* comments of Petrocom at 10, footnote 11. We note, however, that the Commission has on several occasions declined to authorize the Gulf carriers to locate transmitters at land-based cell sites because of the possibility of interference to the adjacent market systems. *See, e.g., Petroleum Communications, Inc.*, 2 FCC Rcd 3695, 3697 (1987), 54 RR 2d 1020, 1025-26 (1983) and 1 FCC Rcd 511, 513 (1986)

[9] *See* comments of Pactel Cellular (Pactel) at 7 and Attachment 3; *see also* comments of Southwestern Bell Mobile Systems, Inc. ("SBMS") at 10-11. Pactel suggests the use of a similar formula (the "LEE2" formula), which was derived from Dr. William C. Y. Lee's open area formula, which was in turn based on measurement data. Pactel states that the LEE2 formula approximates the distance to the median 30 dBu field strength contour, which it asserts is appropriate for areas without terrain obstructions. SBMS recommends that the constant in the Commission's proposed formula be changed from 1.65 to 2.13. SBMS notes that the constant it proposes would produce a service range of 35 miles for a facility using 500 watts ERP with a 500 foot high tower. Although not based on detailed studies, SBMS believes that this range approximates actual coverage over water from such a facility.

[10] One of the cell sites used by Petrocom for field strength measurements is a GMSA cell site located offshore. The other cell site is located two miles inland, but apparently provides coverage in coastal waters of the Gulf of Mexico. There was little difference in the rates of signal attenuation as a function of increasing distance from the two sites.

[11] Of particular note is that the mobile station used by Petrocom has a mast-mounted antenna at a height of approximately 30 feet above sea level. The Commission staff, in developing the proposed formula, assumed that the mobile station antenna would be closer to the surface.

[12] The GMSA formula appears in new Section 22.903(a)(2). Neither the LEE2 formula nor SBMS's modification to the proposed formula appears to be more appropriate for use in the GMSA than Petrocom's suggested approach. Petrocom's modification to the proposed formula is based upon actual measurements in the GMSA made from a typical GMSA mobile installation, whereas the other methods appear to be estimates, based on measurements taken elsewhere, or derived from theory.

[13] It is necessary to establish minimum values to insure that the formula does not produce erroneous or misleading results. *See Second Report* at 5-6, paragraphs 10, 11. Petrocom states that the average antenna height above sea level for its offshore sites is limited to 148 feet because of safety and space considerations on

oil production platforms, and that it would use higher heights if it could. *See* comments of Petrocom at 5-6. Consequently, the issue of low antenna heights is not likely to arise.

[14] *See* Section 22.903(b) of the rules.

[15] *See* comments of Petrocom at 13. According to Petrocom, a signal from a typical cellular facility in the Gulf of Mexico with a median field strength of 28 dBu would provide an acceptable quality cellular service.

[16] *See Second Report and Order* at 4-5, paragraph 8. In the *Second Report*, we acknowledged that the formula for calculating the distance to the cellular service area boundary (for all markets except the GMSA) was designed to approximate the distance over average terrain to the Carey predicted 32 dBu median field strength contour. However, to avoid generally unproductive disputes as to whether one method of ascertaining median field strength is more or less accurate than another, we adopted the formula itself as the standard, rather than the 32 dBu median field strength contour.

[17] The term "water areas" as used here refers only to United States territorial waters. The Commission does not anticipate authorizing cellular systems outside the territorial lands or waters of the United States.

[18] *See* Further *Notice* at 8, para. 15.

[19] *See* comments of Nynex Mobile Communications Company at 7, comments and reply of Centel Cellular Company at 7 and 6, respectively.

[20] *See* comments of Rochester, at 10.

[21] *See* new Section 22.924(a)(3).

[22] Current Section 22.920(c) requires that each system be constructed and operated, providing service to the public for one year, before the Commission will consider an application for assignment of the authorization.

[23] *See* Sections 22.920(a) and 22.40(b) of the rules.

[24] Section 22.922 prohibits the sale, transfer, assignment or other alienation of any ownership interest in a cellular application prior to the grant of a construction authorization. This restriction on transfers includes any form of alienation, including option arrangements and agreements, as well as equity and debt placement plans.

[25] We are revising the introductory paragraph of Section 22.925 of the rules to clarify that maps submitted as part of a cellular system's information update must include maps for each market into which the CGSA extends, even if *de minimis*, showing the extension area in the adjacent market, marked and labeled for the adjacent market. We are also including language in that introductory paragraph explaining that the maps submitted as part of a system's update should include proposed modifications pending before the Commission which have not been granted prior to the date upon which the licensee files its system information update. Such language was included in the *First Report*, but was inadvertently omitted in the version of Section 22.925 of our rules which was adopted in the *Second Report*.

[26] On August 10, 1992, Committee filed a Petition for Partial Reconsideration of the Commission's *Public Notice* entitled "Clarification of Cellular System Information Update Requirements," Report No. CL-92- 16, released July 10, 1992. That public notice contained a series of recurring questions concerning the submission of cellular system information updates required by Section 22.925 of the rules and pertinent answers to those questions. One of the answers stated that the Commission would not accept petitions to dismiss or deny a systems information update submitted by a cellular licensee. Committee asserts that the foregoing statement improperly resolved issues which have been raised by pending petitions for reconsideration in this docket. We note that our resolution herein of such issues overrules any inconsistent statements in the referenced public notice, thus rendering moot Committee's petition for partial reconsideration.

[27] Fisher and Brown observe that paragraph 67 of the *First Report* requires Federal Aviation Administration (FAA) notification by lottery winners only in Phase I, not all applicants, whereas FAA notification must be made by all applicants in Phase II, in which applications will be granted on a first come, first served basis. The argument concerning FAA notifications is inapposite because FAA clearance is only needed for the lottery winner. Thus, requiring all applicants in Phase I to request FAA clearance would overburden the FAA for no useful purpose. The first come, first served processing rules for Phase II should not result in unnecessary FAA clearance filings.

[28] The official name of the Carey Report is: Report No. R-6406, "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Service" by Roger B. Carey. The Carey Report has field strength curves which have been utilized to determine 39 dBu contours.

[29] The Phase I licensee may file one major modification application within 90 days of the grant of its initial authorization without being subject to competing applications. The modification application may propose *de minimis* or contract extensions into an adjacent market in accordance with new paragraphs (d)(3)(ii) through (d)(3)(iv) of Section 22.903 of the rules which we are adopting today. *See* Section 22.902(b)(4)(ii) of the rules.

[30] New Par and Committee concur with NewVector's objection.

[31] We observe that if an unserved area applicant other than an applicant filing in Phase I proposes an extension into an adjacent market which does not violate Section 22.903(d)(3)(i) of our rules and the licensee on the same frequency block in that adjacent market consents to the extension, no *de minimis* issue would arise. We are also revising the language of Section 22.903(d)(1) of the rules to clarify the point that an application proposing an extension into the CGSA of any other licensee's cellular system on the same frequency block without that licensee's consent, or into any adjacent MSA or RSA on a frequency block for which the five-year fill-in period has expired, will be considered to be defective.

[32] Committee requests that we allow MSA licensees to authorize contract extensions into their markets, as RSA licensees are allowed to do. We observe that new Section 22.903(d)(2), which was adopted in our *Second Report*, explicitly allows such contract extensions in MSAs as well as RSAs.

[33] We followed this policy in processing RSA applications. *See* Section 22.903(a)(1) as it existed just prior to the *First Report*.

[34] This 75 percent requirement was eliminated by the *Second Report*, because the *Second Report* redefined the CGSA as the area actually served by a cellular licensee.

[35] A discussion concerning requests for CGSA consolidation is contained in Section V of our *First Report*, which is entitled "Rules Applicable to All Cellular Licensees."

APPENDIX A

Parties Commenting on Further Notice of Proposed Rule Making

Ameritech Mobile Communications, Inc.
Applicants Against Lottery Abuses
Bell Atlantic Mobile Systems, Inc.
BellSouth Corporation
Cellular Telecommunications Industry Association
Centel Cellular Company
CNet, Inc.
Committee for Effective Cellular Rules
Comp Comm, Inc.
Kerr, Douglas A., P.E.
McCaw Cellular Communications, Inc.
New Par
NYNEX Mobile Communications Company
PacTel Cellular
PMN, Inc.
Quantum Communications Group, Inc.
Rochester Telephone Mobile Communications
Rural Cellular Telephone Coalition
Southwestern Bell Mobile Systems, Inc.
U S WEST NewVector Group, Inc.

Parties Filing Reply Comments

ALLTEL Mobile Communications, Inc.
Applicants Against Lottery Abuses
Cellular Telecommunications Industry Association
Centel Cellular Company
Committee for Effective Cellular Rules
Comp Comm, Inc.
Galveston Cellular Telephone Company
JAJ Cellular
McCaw Cellular Communications, Inc.
New Par
NYNEX Mobile Communications Company
PacTel Cellular
Petroleum Communications, Inc.
PMN, Inc.
Quantum Communications Group, Inc.
RVC Services, Inc.
Telocator

APPENDIX B

Final Rules

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1083, as amended; 47 U.S.C. 154, 303.

2. Section 22.28 is amended by revising paragraph (a) to read as follows:

Section 22.28 Dismissal and return of applications.

(a) Except as provided under Sections 22.29, 22.928, and 22.943, any application may be dismissed without prejudice as a matter of right if the applicant requests its dismissal prior to designation for hearing. An applicant's request for the return of his application after it has been accepted for filing will be considered to be a request for dismissal without prejudice. Requests for dismissal shall comply with the provisions of Section 22.29 as appropriate.

* * * * *

3. Section 22.29 is amended by revising the introductory portion of paragraph (a) to read as follows:

Section 22.29 Ownership changes and agreements to amend or to dismiss applications or pleading.

(a) Applicability. Subject to the provisions of Sections 22.927, 22.928, 22.929, and 22.943, this section applies to applicants and all other parties interested in pending applications who wish to resolve contested matters among themselves with a formal or an informal agreement or understanding. This section applies only when the agreement or understanding will result in:

* * * * *

4. Section 22.902 is amended by revising the introductory text of paragraph (b)(4) and paragraphs (b)(4)(i), (b)(4)(ii), and (b)(4)(ii)(B)(3) to read as follows:

Section 22.902 Frequencies.

* * * * *

(b) * * *

(4) Each Phase I application must request authority to provide service to unserved area in one specific MSA or RSA.

(i) Applicants may file only one application per MSA or RSA and may request only one CGSA per application. The initial applications in Phase I must not contain any *de minimis* or contract extensions of the proposed service area boundaries beyond the boundary of the MSA or RSA. Any initial Phase I application proposing an extension will be dismissed.

(ii) Each Phase I licensee may file, no later than 90 days after the grant of the authorization, one and only one application for major modifications to the unserved area cellular system. The Commission will not accept or consider any competing application(s) filed in response to such applications for major modification. Applications for major modification may propose *de minimis* or contract extensions into adjacent MSAs and RSAs in accordance with the provisions of Section 22.903(d)(3).

* * * * *

(B) * * *

(3) Phase II applications may propose service areas covering more than one MSA or RSA. A separate Phase II application must be filed for each area; one CGSA per application. Phase II applications may propose *de minimis* and contract extensions into adjacent MSAs and RSAs in accordance with Section 22.903(d)(3).

* * * * *

5. Section 22.903 is amended by revising paragraphs (a), (d)(1), and (d)(3)(i) through (d)(3)(iv) and adding new paragraph (e) to read as follows:

Section 22.903 Cellular geographic service area.

* * * * *

(a) *CGSA determination.* The CGSA is the composite of the service areas of all of the cells in the system, excluding any area outside of the MSA or RSA boundary, except as provided in paragraph (c) of this section, and excluding any area within the CGSA of another cellular system. The service area of a cell is the area within its service area boundary. The distance to the service area boundary is calculated as a function of effective radiated power (ERP) and antenna center of radiation height above average terrain (HAAT), height above sea level (HASL), or height above mean sea level (HAMSL).

(1) Except as provided in paragraph (a)(2) of this section, the radial distance from a cell transmitting antenna to its service area boundary is calculated as follows:

$$d = 1.05 \times h^{0.34} \times p^{0.17}$$

where d is the radial distance in miles

h is the radial antenna HAAT in feet

p is the radial ERP in Watts

(2) For the cellular systems authorized to serve the Gulf of Mexico MSA, the radial distance from a cell transmitting antenna to its service area boundary is calculated as follows:

$$d = 3.00 \times h^{0.30} \times p^{0.15}$$

where d is the radial distance in miles

h is the radial antenna HASL or HAMSL in feet

p is the radial ERP in Watts

(3) Where the actual HAAT is less than 100 feet, 100 must be used as the value for h in the formula in paragraph (a)(1) of this section. Where the actual HASL (or HAMSL, as appropriate for the support structure) is less than 25 feet, 25 feet must be used as the value for h in the formula in paragraph (a)(2) of this section.

(4) The value used for p in the formulas in paragraphs (a)(1) and (a)(2) of this section must not be less than 0.1 Watt or 27 dB below (1/500 of) the maximum ERP in any direction, whichever is more.

* * * * *

(d) * * *

(1) *De minimis extensions.* Service area boundaries may extend into adjacent MSAs or RSAs if such extensions are *de minimis*, are demonstrably unavoidable for technical reasons of sound engineering design, and do not extend into the CGSA of any other licensee's cellular system on the same frequency block (unless the other licensee consents to the extension) or into any adjacent MSA or RSA on a frequency block for which the five year fill-in period has expired.

* * * * *

(3) * * *

(i) The service area boundaries of the cells must not extend into the CGSA of any other licensee's cellular system on the same frequency block or into any adjacent MSA or RSA on a frequency block for which the five year fill-in period has expired.

(ii) For initial applications filed in Phase I, the service boundaries of the cells must not extend beyond the boundary of the relevant MSA or RSA. Applicants in Phase II and licensees filing their sole major modification applications in Phase I may propose *de minimis* and contract extensions into adjacent markets subject to the conditions imposed by paragraphs (d)(3) (i) through (d)(3)(iv) of this section. Any such requests for *de minimis* extensions beyond the boundary of the relevant MSA or RSA must demonstrate that the system is designed to serve only areas within the CGSA, the extensions are unavoidable because of irregular terrain or unusual MSA or RSA boundaries, and the extensions are into an MSA or RSA on a frequency block for which the five year fill-in period has not elapsed. During the remainder of such five year fill-in period, systems authorized with *de minimis* extensions must accept any interference from and not cause any interference to the MSA or RSA system in the *de minimis* extension area. *See* Section 22.902(d)(4) of this subpart. Area within *de minimis* extensions does not count toward the minimum coverage requirement of Section 22.924 of this subpart.

(iii) Licensees filing their sole major modification applications in Phase I and applicants in Phase II may propose service area boundaries that extend into a market for which the five year fill-in period has not elapsed in accordance with a contract with the licensee of the system on the relevant frequency block in that market, pursuant to paragraph (d)(2) of this section. Area within such contract extensions counts toward the minimum coverage requirement of Section 22.924 of this subpart.

(iv) An applicant for an unserved area, which is also the licensee of the cellular system on the same frequency block in an adjacent market for which the fill-in period has not expired, may, in its Phase I major modification application or in a Phase II application, apply for an area which extends into that adjacent market.

(e) A single cell may be used to serve multiple markets. Nevertheless, a cell located in one market may not be used in determining the CGSA for a different MSA, RSA, or unserved area market unless the cell is licensed for both markets.

6. Section 22.920 is amended by revising the introductory portion of paragraph (c) to read as follows:

Section 22.920 Considerations involving transfer or assignment applications for cellular authorizations.

* * * * *

(c) *Unserved areas.* Except in situations involving the death or incapacity of the controlling owner of an initial authorization for an unserved area, an authorization for an unserved area cannot be transferred or assigned prior to the licensee's providing service to the public for one year.

* * * * *

7. Section 22.922 is amended by revising the section heading and adding paragraph (b) to read as follows:

Section 22.922 Transfers and assignments of applications or licenses in Rural Service Areas.

* * * * *

(b) *Unserved areas.* The provisions of paragraph (a) of this section apply to applications for unserved areas.

8. Section 22.924 is amended by adding a new paragraph (a)(3) to read as follows:

Section 22.924 Content and form of applications for unserved areas.

* * * * *

(a) * * *

(3) Applications that propose coverage of water areas only (or water areas and uninhabited islands or reefs), other than areas in the Gulf of Mexico MSA, will not be accepted for filing.

* * * * *

9. Section 22.925 is amended by revising the introductory pargraph to read as follows:

Section 22.925 System information update.

Sixty days before the end of the five year fill-in period, the licensee of each cellular system authorized on each channel block in each cellular market must file, in triplicate, a full scale map, a reduced map, and an updated frequency utilization chart. Maps must be submitted for each market into which the CGSA extends, even if *de minimis*, showing the extension area in the adjacent market, marked and labeled for the adjacent market. These maps should also depict any proposed modifications pending before the Commission which have not been granted prior to the date upon which the licensee files its system information update. These maps and the chart must accurately depict the cell locations and coverage of the system at the end of the five year fill-in period. The maps and chart must be filed at the Mobile Services Division, Common Carrier Bureau, Federal Communications Commission, Washington D.C. 20554. If any changes to the system occur after the filing of these maps and the chart, but before the end of the five year fill-in period, the licensee must file, in triplicate, additional maps or charts as necessary to insure that the cell locations and coverage of the system as of the end of the five year fill-in period are accurately depicted.

* * * * *

10. Section 22.927 is added to read as follows:

Section 22.927 Dismissal or withdrawal of petitions to deny, other pleadings or informal objections filed against cellular radio applications.

(a) Whenever a petition to deny, informal objection, or other pleading has been filed against a cellular radio application and the filing party seeks to dismiss or withdraw the petition, informal objection, or other pleading, either unilaterally or in exchange for financial consideration, the party must file with the Commission a request for approval of the dismissal or withdrawal, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the filing party nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal or withdrawal of the petition to deny, informal objection, or other pleading;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the dismissal or withdrawal of the petition to deny, informal objection, or other pleading.

(5) In addition, within 5 days of the filing date of the petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(i) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the filing party in exchange for dismissing or withdrawing the petition to deny, informal objection, or other pleading; and

(ii) The terms of any oral agreement relating to the dismissal or withdrawal of the petition to deny, informal objection, or other pleading.

(b) For the purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) A petition, informal objection, or other pleading shall be deemed to be pending before the Commission from the time the pleading is filed with the Commission until an order of the Commission granting, denying, or dismissing the pleading is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by a petitioner or the party filing any informal objection or pleading in preparing, filing, and prosecuting its petition, informal objection, or pleading for which reimbursement is being sought.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as nonfinancial concessions that confer any type of benefit on the recipient.

11. Section 22.928 is added to read as follows:

Section 22.928 Dismissal of cellular radio applications.

(a) Except as provided in Section 22.943 of this subpart regarding dismissal of cellular radio applications in comparative renewal proceedings, any cellular radio applicant for construction authority that has filed an application that is mutually exclusive with another cellular radio application and enters an agreement to remove a conflict between pending cellular radio applications by withdrawal or dismissal of its application or an amendment thereto, must obtain the approval of the Commission.

(b) The party seeking dismissal of its application must submit to the Commission a request for approval of the dismissal or withdrawal of its cellular radio application, a copy of any written agreement related to the dismissal or withdrawal of its application, and an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal or withdrawal of the application, except that this provision shall not apply to *bona fide* merger agreements;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

(5) In addition, within 5 days of the filing date of the applicant's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(i) A certification that neither the applicant nor its principals has paid or will pay any money or other consideration in excess of the legitimate and prudent expenses of the petitioner in exchange for dismissing or withdrawing the application; and

(ii) The terms of any oral agreement relating to the dismissal or withdrawal of the application.

(c) For the purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) A cellular radio application shall be deemed to be pending before the Commission from the time the application is filed with the Commission until an order of the Commission granting, denying, or dismissing the application is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by an applicant in preparing, filing, and prosecuting its application.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as nonfinancial concessions that confer any type of benefit on the recipient.

12. Section 22.929 is added to read as follows:

Section 22.929 Threats to file petitions to deny, informal objections, or other pleadings against cellular radio applications.

(a) No person shall make or receive any payments in exchange for withdrawing a threat to file or refraining from filing a petition to deny, informal objection, or any other pleading against a cellular radio application. For the purposes of this section, reimbursement by a cellular radio applicant of the legitimate and prudent expenses of a potential petitioner or other filing party incurred reasonably and directly in preparing to file a petition to deny, informal objection, or other pleading will not be considered to be payment for refraining from filing a petition to deny, informal objection, or other pleading. Payments made directly to a potential petitioner, objector, or filing party or a person related to such a filing party, to implement nonfinancial promises are prohibited unless specifically approved by the Commission.

(b) Whenever any payment or reimbursement of legitimate and prudent expenses is made in exchange for withdrawing a threat to file or refraining from filing a petition to deny, informal objection, or other pleading against a cellular radio applicant, the applicant must file with the Commission a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) Certification that neither the would-be petitioner or would-be filing party nor any person or organization related to the would-be petitioner or would-be filing party,

has received or will receive any money or other consideration in connection with the agreement other than legitimate and prudent expenses reasonably incurred in preparing to file the petition, informal objection, or other pleading; and

(2) The terms of any oral agreement.

(c) For purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) "Legitimate and prudent expenses" are those expenses reasonably incurred by a would-be petitioner or would-be filing party in preparing to file its pleading for which reimbursement is being sought.

(3) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

13. Section 22.944 (Dismissal of petitions to deny in renewal proceedings) and Section 22.945 (Threats to file petitions to deny or informal objections in renewal proceedings) are removed.

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's Final Analysis is as follows:

I. Need and purpose of this action:

In this document, the Federal Communications Commission adopts separate methods for calculating service in the Gulf of Mexico Metropolitan Statistical Area and over water in other markets. Further, the Commission limits the consideration that an applicant or a party filing a pleading may receive for agreeing to withdraw a mutually exclusive cellular radio application or a pleading, or for refraining from filing a pleading, against a cellular radio application. The Commission also adopts prohibitions against alienating ownership interests in applications for unserved areas. In addition, this document disposes of ten petitions for reconsideration of the Commission's *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6195 (1991) *(First Report)*, concerning the acceptance, processing, and selection of applications for unserved areas. This document also revises and clarifies rules previously adopted in this docket.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

The public comments in this proceeding did not address regulatory flexibility issues specifically.

III. Significant alternatives considered:

The Commission considered variations of the method for determining the Cellular Geographic Service Area in the Gulf of Mexico and found the adopted method to be superior to the alternatives considered and appropriate for the purpose intended. Otherwise, the comments received in this proceeding generally support the actions taken herein. Modifications and clarifications of our proposed and recently adopted rules which the commenters suggested were considered and some were adopted.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTIC

Released: October 23, 1992

PETITIONS FOR RECONSIDERATION AND APPLICATIONS FOR REVIEW OF THE COMMON CARRIER BUREAU'S RESPONSIBLE ACCOUNTING OFFICER LETTER NO. 21 REGARDING THE CLASSIFICATION OF REMOTE CENTRAL OFFICE EQUIPMENT FOR ACCOUNTING PURPOSES (AAD 92-86)

PUBLIC COMMENT INVITED

Comment date: November 25, 1992
Reply date: December 11, 1992

On September 8, 1992 the Common Carrier Bureau released a modified version of Responsible Accounting Officer (RAO) Letter No. 21 regarding the classification of remote central office equipment for accounting purposes.[1] RAO 21 is limited to providing definitions for remote switches and remote terminals of concentrators. On October 8, 1992 we received: Petitions for Reconsideration from the Alltel Service Corporation, the National Exchange Carrier Association, and the Southwestern Bell Telephone Company; Petitions for Reconsideration and/or Clarification from the National Telephone Cooperative Association and the Organization for the Protection and Advancement of Small Telephone Companies; Petition for Limited Reconsideration from the United States Telephone Association; Application for Review from the Roseville Telephone Company; and a Petition for Clarification or, in the Alternative, Application for Review from John Staurulakis, Inc. In addition, Lexington Telephone Company filed a letter, which it characterized as an Application for Review of the initial RAO 21, and letters were filed by Pond Branch Telephone Company and Shenandoah Telephone Company.

Parties may file comments on these pleadings no later than **November 25, 1992.** Replies should be filed by **December 11, 1992.** Comments should reference AAD 92-86. A copy of each pleading should be sent to Bob Hall, FCC Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1990 M Street, N.W., Suite 640, Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Bob Hall, (202) 634-1861.

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[1] The initial RAO 21 was released Aug. 7, 1992. The modified version released Sept. 8 provided further clarification. Several pleadings filed in response to the initial version have since been withdrawn or dismissed without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Roy J. Stewart
Chief, Mass Media Bureau

In re Complaint of

LAWTON CHILES, BOB MARTINEZ,
BILL NELSON, and JIM SMITH
Against Station WTVT(TV),
Tampa, Florida

MODIFICATION OF ORDER

Adopted: October 28, 1992; Released: October 28, 1992

By the Chief, Mass Media Bureau:

1. On October 2, 1992, the Bureau released an *Order* establishing the scope of, and procedures for, discovery on the issue whether station WTVT(TV), Tampa, Florida, overcharged candidates Lawton Chiles, Bob Martinez, and Bill Nelson, in violation of the lowest unit charge requirement of Section 315(b)(1) of the Communications Act, during the 1990 primary and general elections. DA 92-1365. The Bureau directed that discovery would begin on November 2, 1992, and conclude on December 31, 1992.

2. On October 14, 1992, WTVT License, Inc., licensee of station WTVT, filed an application for review of the Bureau's *Order*, asking that the scope of discovery, particularly with respect to document production, be limited. On October 19, 1992, WTVT License, Inc. filed a motion for stay, requesting that the Bureau's *Order* be stayed pending resolution of the issues raised in the application for review.

3. We do not here address issues raised by WTVT's application for review. However, pursuant to Section 1.113(a) of the Commission's rules, 47 C.F.R. Section 1.113(a), the Bureau on its own motion hereby modifies its October 2, 1992, *Order* to extend the date for commencement of discovery to December 2, 1992, and the date for conclusion of discovery to February 1, 1993. The Bureau's *Order* is the first to address a candidate complaint filed pursuant to the procedures established in the *Declaratory Ruling* in *Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended*,[1] and, thus, we believe that it is important to allow sufficient time for Commission review of the issues raised by WTVT. In addition, we recognize that the original date for commencement of discovery falls just before the November 3, 1992, general election, and therefore places a significant burden on the licensee during an otherwise busy time of the year.

4. ACCORDINGLY, we hereby modify our October 2, 1992, *Order* in this proceeding to extend the date for commencement of discovery to December 2, 1992, and the date for conclusion of discovery to February 1, 1993.

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[1] 6 FCC Rcd 7511 (1991), *recon. denied*, 57 Fed. Reg. 27,367 (June 19, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-314

ET Docket No. 92-100

In the Matter of

Amendment of the Commission's Rules to Establish New Personal Communications Services	RM-7140, RM-7175, RM-7617, RM-7618, RM-7760, RM-7782, RM-7860, RM-7977, RM-7978, RM-7979, RM-7980
	PP-35 through PP-40, PP-79 through PP-85

ORDER DENYING REQUEST TO DEFER COMMENT AND REPLY COMMENT DATES

Adopted: October 29, 1992; Released: October 30, 1992

Comment Date: November 9, 1992
Reply Comment Date: December 9, 1992

By the Office of Engineering and Technology:

1. On October 26, 1992, the National Cable Television Association, Inc. (NCTA) requested that the time for filing comments and reply comments in the above-captioned proceeding be extended from November 9, 1992 and December 9, 1992, respectively, to December 9, 1992 and January 8, 1993.

2. In its request, NCTA argues that this extension is warranted by the need to enable parties to analyze more fully the complex issues in this proceeding. NCTA also states that its Board of Directors has not had an opportunity to address the technical and policy issues raised in the *Notice of Proposed Rule Making and Tentative Decision* (*Notice*) and that a board meeting is not scheduled until November 10-11, 1992.

3. The Commission does not routinely grant extensions of time.[1] We believe that the comment period of nearly three months provided by the *Notice* is sufficient for all issues to be fully and completely analyzed and addressed. Further, as the Commission stated in the *Notice* at paragraph 7, it believes that the public interest is served by not delaying this proceeding so that the public may have the benefit of personal communications services at the earliest opportunity. Therefore, we find that the original comment period is appropriate. Accordingly, IT IS ORDERED, that the request to defer the comment and reply comment deadlines in this proceeding IS DENIED.

4. This action is taken pursuant to authority found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241, and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241, and 1.46. For further information, contact Rodney Small, Office of Engineering and Technology, (202) 653-8116.

FEDERAL COMMUNICATIONS COMMISSION

Bruce A. Franca
Acting Chief Engineer

[1] 47 C.F.R. Section 1.46 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions for Redesignation of the Common Carrier Point-to-Point Microwave Radio Service Frequency Band 27.5 GHz - 29.5 GHz	RM-7722, RM-7872

ORDER

Adopted: October 28, 1992; Released: October 29, 1992

By the Chief, Common Carrier Bureau:

1. Pending before the Commission are several petitions for rulemaking (RM 7722, *Public Notice* Report No. 1845, released May 15, 1991; RM-7872, (two petitions), *Public Notice* Report No. 21049, released December 16, 1991 concerning use of the 27.5 - 29.5 GHz band (28 GHz band) which is designated for common carrier point-to-point microwave radio use. The petitions request that the Commission redesignate the 28 GHz band for a variety of different services and they conflict in some areas. The existing rules governing the point-to-point use of the 28 GHz band do not address the new services proposed. Each petition suggests specific rule changes to support its proposed use of the spectrum. Thus, any one of the petitions for rulemaking, if granted, would require new application processing and technical rules for this frequency band.

2. Notwithstanding the issues raised by the pending rulemaking petitions, several hundred applications accompanied by petitions for waiver of the current rules have been filed. The increasing number of applications constitutes a burden on the Commission's scarce resources. Moreover, waiver applications will not necessarily be in conformance with application and technical requirements which may be developed for the 28 GHz band if any of the rulemaking petitions is granted. For these reasons, we find that the public interest will be served by not accepting any further applications for this frequency band, pending Commission action on the rulemaking petitions. Accordingly, effective upon the release date of this Order, no applications of any kind in the Common Carrier Point-to-Point Microwave Radio Service for the 28 GHz band will be accepted for filing.[1] Any such applications received on or after this date will be returned as unacceptable for filing.

3. WHEREFORE, as discussed herein, IT IS HEREBY ORDERED that effective upon the release date of this Order, no applications will be accepted for filing for the 27.5 GHz - 29.5 GHz frequency band in the Common Carrier Point-to-Point Microwave Radio Service. This ban will continue until the Commission makes an announcement that such application acceptance will resume.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] The Commission's decision to impose this freeze is procedural in nature and therefore the freeze is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act. *See* 5 U.S.C. §553(b)(A), (d); Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963). Moreover, there is good cause for the Commission's not using notice and comment procedures in this case, or making the freeze effective 30 days after publication in the Federal Register, because to do so would be impractical, unnecessary, and contrary to the public interest because compliance would undercut the purposes of the freeze. *See* 5 U.S.C. §553(b)(B), (d)(3).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications, Inc. — Transmittal No. 53

Tariff F.C.C. No. 1

ORDER

Adopted: October 28, 1992; Released: October 28, 1992

By the Chief, Tariff Division:

1. BellSouth Telecommunications, Inc. (BellSouth) filed Transmittal No. 53 on July 31, 1992, to restructure certain DS1 and DS3 services into LightGate 1, 2 and 3 services, and to introduce a new higher capacity offering, LightGate 4. BellSouth also proposes changing the pricing of DS3 channel terminations from a flat rate to a distance-sensitive rate, measured per half "airline" mile. Transmittal 53 is scheduled to become effective on October 29, 1992.[1]

2. On August 17, 1992, WilTel, Inc. (WilTel) filed a petition to reject or suspend and investigate Transmittal 53. BellSouth replied to WilTel's petition on August 27, 1992. WilTel argues BellSouth's distance-sensitive charges for local channels are not cost justified and, because those charges do not directly reflect the actual economic costs of providing additional channel miles, are unreasonable in violation of Section 201(b) of the Communications Act. WilTel Petition at 3, 5-6. WilTel maintains that any mark-up of channel termination prices above direct costs is unacceptable because of an alleged resulting distortion of the interexchange market. *Id.* at 3. WilTel also contends that a distance-sensitive rate structure for local channels is unreasonably discriminatory in violation of Section 202(a) of the Act because AT&T inherited direct connections to nearly all end offices in the United States at divestiture, while AT&T's competitors are located farther away from such end offices. *Id.* at 2, 3.

3. BellSouth replies it has provided sufficient cost information to demonstrate that its proposed distance-sensitive local channel structure is cost-based. BellSouth Reply at 4-5. BellSouth notes it is in full compliance with price cap rules. *Id.* at 4-6. BellSouth also argues AT&T is not advantaged by virtue of location under a distance-sensitive local channel rate structure, because AT&T and WilTel have approximately the same proportion of points of presence within a half mile of their serving centers. *Id.* at 2.

4. The Bureau has reviewed Transmittals 53 and 69 and all associated pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate BellSouth Tariff F.C.C. No. 1, Transmittal No. 53, filed by WilTel, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] At the request of Tariff Division staff, BellSouth filed Transmittal No. 69 on October 23, 1992 to clarify the language in Transmittal 53, and to revise cost support information affected by the clarifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-380

In the Matter of

American	Transmittal Nos. 3509,
Telephone and	3513, 3561,
Telegraph Company	3571, and 3676

Revisions to Tariff
F.C.C. No. 12

ORDER

Adopted: October 29, 1992; Released: October 30, 1992

By the Chief, Common Carrier Bureau:

1. On December 31, 1991, the Common Carrier Bureau issued an Order to Show Cause,[1] commencing a proceeding with regard to the above-captioned transmittals filed by American Telephone and Telegraph Company (AT&T). The referenced transmittals proposed substantial modifications to existing Virtual Telecommunications Network Service (VTNS) regulations and options, filed under AT&T Tariff F.C.C. No. 12. All of these VTNS options included inbound services.

2. AT&T filed its answer to the *Show Cause Order* on January 9, 1992. Oppositions to that answer were filed on January 17, 1992 by US Sprint Communications Company Limited Partnership (Sprint), MCI Telecommunications Corporation (MCI), and the Competitive Telecommunications Association (Comptel). Comments were filed January 17, 1992 by the Customer Network Services Users Group (CNS Users Group) and a statement was filed by Ad Hoc Telecommunications Users Committee (Ad Hoc). On January 23, 1992, AT&T filed a reply to oppositions. Subsequently, MCI filed a motion to strike AT&T's reply.[2]

3. The issuance of the *Show Cause Order* was primarily based on the Commission's decision in the *Interexchange Order* in CC Docket No. 90-132 concerning bundling of 800 and other inbound services.[3] In the *Interexchange Order*, the Commission precluded AT&T from including in Tariff 12 options or contract tariffs any 800 or inbound service. The Commission allowed existing Tariff 12 VTNS options on file as of the adopted date of that order to continue in effect, however, to avoid unnecessary customer hardship. Because the Commission excepted from its 800 bundling prohibition only those Tariff 12 Options in effect at the time of the *Interexchange Order*, the Bureau rejected transmittals like those captioned above which modified substantially the existing options. Thus, when the transmittals captioned above took effect inadvertently, the Bureau issued the Order to Show Cause in this docket. Subsequent to the initiation of this docket, the Commission adopted its order on reconsideration in CC Docket No. 90-132 in which it modified the grandfathering rule established in the *Interexchange Order*.[4] The *Reconsideration Order* changed the grandfathering provision to permit otherwise lawful modifications of existing options. Given this change, the reasons for issuing the *Show Cause Order* no longer exist. We therefore terminate the proceeding initiated by that order.

4. Accordingly, IT IS ORDERED that the proceeding concerning American Telephone and Telegraph Company, concerning Tariff F.C.C. No. 12, Transmittal Nos. 3509, 3513, 3561, 3571, and 3676, released December 31, 1992, IS TERMINATED.

5. IT IS FURTHER ORDERED that the reply filed by American Telephone and Telegraph Company on January 23, 1992, IS DISMISSED.

6. IT IS FURTHER ORDERED the motion to strike filed by MCI Telecommunications Corporation on January 27, 1992, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] American Telephone and Telegraph Company, CC Docket No. 91-380, Order to Show Cause, 7 FCC Rcd 533 (1991) (*Show Cause Order*).

[2] The *Show Cause Order* established a two-part pleading cycle, consisting of an answer by AT&T and oppositions to AT&T's answer. The *Show Cause Order* did not establish a reply round. Therefore, we dismiss AT&T's reply and MCI's motion to strike that reply.

[3] Competition in the Interstate Interexchange Marketplace, Report and Order, CC Docket No. 90-132, 6 FCC Rcd 5880, 5904-06 (1991) (*Interexchange Order*).

[4] Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order on Reconsideration, CC Docket No. 90-132, 7 FCC Rcd 2677 (1992) (*Reconsideration Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-190

In the Matter of

Austin Public Safety Plan

ORDER

Adopted: October 30, 1992; Released: November 6, 1992

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On May 7, 1992, Region 49 (Austin) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in the Austin area.

2. The Austin Plan was placed on Public Notice for comments on August 18, 1992, 57 FR 38307 (August 24, 1992). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for the Austin area and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in the Austin area.

4. Therefore, we accept the Austin Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in the Austin area may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JERSEY SHORE BROADCASTING CORPORATION — File No. BPH-900117MY

PRESS BROADCASTING COMPANY (formerly LD Broadcasting L.P.) — File No. BPH-900117NA

For Construction Permit for a New FM Station on Channel 289B1 at Manahawkin, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: October 27, 1992; Released: November 6, 1992

By the Commission:

1. The Commission has before it for consideration an application for review filed on April 13, 1992 by Seashore Broadcasting Corporation ("Seashore"). Seashore appeals from the action of the Mass Media Bureau ("Bureau") approving the portion of a settlement arrangement referred to the Bureau by the presiding Administrative Law Judge ("ALJ") in MM Docket No. 91-208, the Manahawkin, New Jersey comparative proceeding. However, we recently granted an application for review filed on February 18, 1992 by Seashore, directed to the Review Board's affirmance of the ALJ's approval of the principal portion of the settlement arrangement. *Atlantic Radio Communications, Inc.*, FCC 92-347, released August 10, 1992. In that Order, we held that all relevant documents should be considered in acting on the settlement. For that reason, we set aside the ALJ's approval of the settlement and remanded the proceeding to the ALJ to reconsider the entire settlement arrangement in light of the inconsistent application rule, 47 C.F.R. § 73.3518. Consistent with that Order, we now set aside the Bureau's approval of that portion of the settlement arrangement which the ALJ referred to it. As indicated in *Atlantic Radio*, the ALJ will reconsider the entire settlement arrangement, including the portion here at issue.

2. ACCORDINGLY, IT IS ORDERED, That the application for review filed on April 13, 1992 by Seashore Broadcasting Corporation IS GRANTED.

3. IT IS FURTHER ORDERED, That the action of the Mass Media Bureau in this matter[1] IS VACATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] *Letter from Chief, Audio Services Division to Robert E. McAllan and Joseph J. Knox, Jr. (8920-MT)*, dated September 27, 1991, *recon. denied, Letter from Chief, Audio Services Division to Counsel for Seashore Broadcasting Corp. (8920-MAT)*, dated March 13, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-68

In re Applications of

MODESTO BROADCAST GROUP	File No. BPH-880229MB
HARRY S. McMURRAY	File No. BPH-880301MP
MODESTO COMMUNICATIONS CORPORATION	File No. BPH-880301NC
BCD LIMITED PARTNERSHIP	File No. BPH-880301OS
THOM REINSTEIN COMMUNICATIONS, A California Limited Partnership	File No. BPH-880301OU
PAMELA R. JONES	File No. BPH-880301OY

For Construction Permit for
New FM Station, Channel 230A,
Modesto, California

ORDER

Adopted: November 2, 1992; Released: November 9, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. Applicants Modesto Broadcast Group and Pamela R. Jones have not filed Exceptions to the *Initial Decision*, 7 FCC Rcd 3404 (ALJ, released June 5, 1992), in the captioned proceeding. Their applications will thus be dismissed for failure to prosecute pursuant to 47 CFR 1.276(f).

2. ACCORDINGLY, IT IS ORDERED, That the applications of Modesto Broadcast Group (File No. BPH-880229MB) and Pamela R. Jones (File No. BPH-880301OY) ARE DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-215

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2	Transmittal No. 518
United Telephone System Companies Revisions to Tariff F.C.C. No. 5	Transmittal No. 273

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 1992; Released: November 6, 1992

By the Commission:

I. INTRODUCTION

1. This investigation of the rates for special access 64 Kbps service charged by United Telephone System Companies (United) in Transmittal No. 273 and by the Ameritech Operating Companies (Ameritech) in Transmittal No. 518 began on May 28, and June 18, 1991, for each company respectively.[1] Based on the test the Commission recently adopted in the *LEC Price Cap New Services Test Reconsideration Order* for the pricing of new services.[2] we find that those rates are not unreasonable and are therefore lawful.

II. BACKGROUND

2. Both transmittals at issue in this investigation were protested by MCI Telecommunications Corporation (MCI), which argued that the carriers' rates for 64 Kbps service are significantly above costs. The Common Carrier Bureau concluded, based on its review of the transmittals, the associated pleadings, and all cost support submitted, that the United and Ameritech transmittals may contain unreasonably high rates in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). The Bureau further concluded that because customers may be subject to excessive rates as a result of these new services, it would suspend the offerings for one day, impose accounting orders, and initiate an investigation of the reasonableness of those rates.[3]

3. On August 6, 1991, the Bureau released an Order which designated issues for investigation[4] to determine whether Ameritech's and United's rates are just and reasonable.[5] In that Order, the Bureau noted that both carriers based their rates for 64 Kbps service on existing rates for other digital services; each carrier was therefore asked to explain why it believes this ratemaking methodology will produce a just and reasonable rate.[6]

4. United and Ameritech filed their direct cases on September 16, and September 17, 1991, respectively. On October 15, 1991, MCI filed an opposition to the direct cases of Ameritech and United arguing that both carriers failed to justify their proposed rates. In addition, argues MCI, much of the information provided in the direct cases was incomplete and irrelevant to the *Designation Order*. MCI Opposition at 3. On October 29, 1991, Ameritech filed a reply and United filed a rebuttal to MCI's opposition.[7] Both carriers claim that their 64 Kbps rates are just and reasonable. Ameritech Reply at 1-2; United Rebuttal at 2.

III. DISCUSSION

5. In the *Part 69 ONA Order*,[8] adopted prior to the Bureau's *Designation Order*, the Commission introduced a flexible cost-based approach to pricing new services that would control excessive and anticompetitive pricing and

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[1] United Telephone System Companies, Revisions to Tariff F.C.C. No. 5, Transmittal No. 273, 6 FCC Rcd 3334 (Com.Car.Bur. 1991) (*United Investigation Order*); Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Transmittal No. 518, 6 FCC Rcd 3716 (Com.Car.Bur. 1991) (*Ameritech Investigation Order*).

[2] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Policy and Rules Concerning Rates for Dominant Carriers, CC Docket Nos. 89-79 & 87-313, Memorandum Opinion & Order On Second Further Reconsideration, FCC 92-325 (released Aug. 6, 1992) (*LEC Price Cap New Services Test Reconsideration Order*), *petitions for further recon. pending*.

[3] *Ameritech Investigation Order*, 6 FCC Rcd at 3716 (para. 6); *United Investigation Order*, 6 FCC Rcd at 3334 (para. 5).

[4] Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Transmittal No. 518 and United Telephone System Companies, Revisions to Tariff F.C.C. No. 5, Transmittal No. 273, Order Designating Issues For Investigation, CC Docket No. 91-215, 6 FCC Rcd 4944 (Com.Car.Bur. 1991) (*Designation Order*) .

[5] The Designation Order directed Ameritech and United to provide the following information in their direct cases with respect to the cost of providing 64 Kbps service: (1) Explain the direct costs for 64 Kbps service. Provide a 12-month showing of these direct costs and include all supporting workpapers; (2) Explain how the fixed cost loadings were determined. Explain also the ratio of direct unit cost to unit investment and direct unit cost to unit price for 64 Kbps and other similar special access services; (3) Provide a study showing the effect of 64 Kbps service on demand and revenues, including the demand and revenues of other services. Include supporting workpapers for estimates of demand and revenues. *Designation Order*, 6 FCC Rcd at 4944.

[6] *Designation Order*, 6 FCC Rcd at 4944 (para. 5 & n.4).

[7] In response to a request by the Tariff Division, Common Carrier Bureau, United provided additional data on June 22, 1992. That data involved specific cost showings and explanations that United had not included in its tariff filing or direct case.

[8] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Policy and Rules Concerning Rates for Dominant Carriers, CC Docket Nos. 89-79 & 87-313, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*).

prevent discrimination. Local exchange carriers (LECs) subject to price caps were allowed to develop their own costing methodologies, constrained by the requirements that the new service would contribute to the LEC's profits,[9] and ratemaking methodologies would be consistent for similar services. To achieve flexible pricing, a LEC was allowed to distribute overhead loading costs in a non-uniform manner among similar services if the LEC adequately justified those loadings.[10]

6. Subsequent to the Bureau's *Designation Order*, the Commission further clarified and modified the cost support required to tariff new services in the *LEC Price Cap New Services Test Reconsideration Order*. Recognizing that the *Part 69 ONA Order* already required carriers to show their direct costs, the Commission decided that LECs would no longer be required to satisfy the net revenue test to ensure that their rates were not predatory. In addition, the *Order* clarified that non-uniform loadings for a new service would be considered justifiable under the *Part 69 Order*, and thus the price of the new service presumptively reasonable, if the price of the new version of an existing service was below the price of the existing service.[11] This is the reasoning we use when we consider the 64 Kbps offerings of Ameritech and United.

7. Ameritech and United argue in their direct cases that while the direct costs for their companies' range of DDS services are similar, the capacities of the services differ considerably[12] and the carriers believe they should therefore be allowed to price in a manner consistent with the increased capacity levels.[13] Ameritech further argues that cross elasticities exist between its 64 Kbps service and its 56 Kbps DDS and OPTINET 56 Kbps service.[14] We agree with Ameritech that customers will migrate from 56 Kbps services to 64 Kbps service to take advantage of its increased capacity. Specifically, 64 Kbps service provides 8 Kbps, or 14 percent, more capacity than the existing 56 Kbps service. This additional capacity gives a customer using a 64 Kbps clear channel the ability to transmit data faster. Moreover, with 64 Kbps service the customer gains control of the channel, which allows the customer to configure the channel to maximize efficiency.

8. We conclude that 64 Kbps service is a close substitute for existing 56 Kbps service. The *LEC Price Cap New Services Test Reconsideration Order* expresses the Commission's commitment to encourage LEC innovation and the introduction of new services by allowing LECs to price a close substitute anywhere below the level of the existing service. We believe that the price of the existing service should be measured on a Kbps basis. Therefore, the relevant existing price with which to compare 64 Kbps service is no higher than the current price per Kbps rate for 56 Kbps service. We find that this test allows LECs to account for an increased capacity for customers when setting rates for new services that are close substitutes for existing services with similar direct costs.

9. Based on the *LEC Price Cap New Services Test Reconsideration Order*, we find that because 64 Kbps service provides an increase of 14 percent in the capacity of 56 Kbps service, the rates for this new service must be less than 14 percent above the rates for 56 Kbps service. If forced to price at the 56 Kbps level, Ameritech and United would have little incentive to offer 64 Kbps service, because they would not earn greater profits than those gained by continuing to offer Kbps service only. In fact, if 64 Kbps service were priced the same as 56 Kbps service, the LECs might lose revenues due to migration of 56 Kbps customers to the 64 Kbps service, because those customers might order fewer total circuits. The record shows that the rates charged by Ameritech and United are both less than 14 percent above the rates the carriers charge for 56 Kbps service and that customers therefore are better off taking the 64 Kbps service than they would be taking the 56 Kbps service, on the basis of capacity.[15] We therefore conclude that the 64 Kbps rates of Ameritech and United are not unreasonable, and are thus lawful.[16] Accordingly, we terminate our investigation of those rates.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the investigation in CC Docket No. 91-215 IS TERMINATED.

11. IT IS FURTHER ORDERED that the accounting order imposed in CC Docket No. 91-215 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[9] The net revenue test placed a lower bound on rates for new services to ensure carriers did not engage in predatory pricing. The net revenue test required LECs to show that anticipated revenues were sufficient to cover direct costs and to produce some level of additional revenues within the first three years after introduction of the new service.

[10] *Part 69 ONA Order*, 6 FCC Rcd at 4531 (para. 44).

[11] *LEC Price Cap New Services Test Reconsideration Order* at para. 11. Because we rely on the clarification of the new services test, we dismiss MCI's argument that the carriers improperly applied the net revenue test.

[12] DDS Services are offered at the following capacities: 2.4 Kbps, 4.8 Kbps, 9.6 Kbps, 56 Kbps, and 64 Kbps.

[13] Ameritech Direct Case at 7-8; United Direct Case at 3-4.

[14] Ameritech Reply at 2. United, on the other hand, claims that its 64 Kbps service is not cross elastic with any other service. United Direct Case at 3.

[15] Although Ameritech claims cross elasticity between 64 Kbps service and two other 56 Kbps services (DDS and OPTINET), we need not determine the weighted average of the old services because the new service rate is well within the 14 percent level of both old service rates.

[16] The direct cases of Ameritech and United, and the comments on those direct cases, principally discuss whether the carriers' 64 Kbps services satisfy the net revenue test. As that test is no longer required for new services, we do not address any of the parties' arguments regarding it.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

Florida MDS, Inc.,	File No. 3843-CM-P-80
J. McCarthy Miller, and	File No. 4374-CM-P-80
Microband Corporation of America	File No. 4531-CM-P-80

For Authority to Construct and Operate a Multipoint Distribution Service station on Channel 1 at Auburndale and Winterhaven, Florida

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 1992; Released: October 22, 1992

By the Domestic Facilities Division:

1. *Introduction.* In response to the filing of an application for authority to construct and operate a Multipoint Distribution Service (MDS) station on Channel 1 at Lakeland, Florida by another applicant,[1] Florida MDS, Inc. (Florida), J. McCarthy Miller (Miller) and Microband Corporation of America (Microband) filed the above-referenced MDS applications.[2] KC Corporation (KC), construction holder for MDS station WFY742 at Orlando, Florida (File No. 5579-CM-P-72), filed a petition to dismiss Florida's application.

2. *Background.* KC had previously filed an initial application for a new MDS station at Orlando. Pompano Corporation (Pompano), the licensee of MDS station WOF43 (File No. 5592-CM-P-72) at Tampa, Florida, had previously filed a modification application (File No. 3428-CM-P-79) to increase the power level of its Tampa station. Both the cochannel Pompano station and the cochannel KC station are within 50 miles of the Florida, Miller, and Microband proposed transmitter sites. The Pompano modification and the KC initial applications were pending when the Florida, Miller, and Microband applications were filed.[3]

3. *Mutual Exclusivity.* KC argues in its petition against Florida's application that:

> [A] grant of the subject application will result in a significant reduction in the existing service area of the KC station. Due to the destructive interference anticipated as a result of a grant of this [Florida] application, a significant number of subscribers may be unable to receive any MDS signal. We do not believe that the material impairment to service caused by activation of the facilities as proposed could be remedied by Florida MDS, Inc. even if full cooperation were obtained.

KC Petition at 1-2. At the time the Florida, Miller, and Microband applications were filed, 47 C.F.R. Sec. 21.31(a) provided:

> The Commission will consider applications to be mutually exclusive if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of one or more of the other applications. The Commission will presume "harmful electrical interference" to mean interference which would result in a material impairment to service rendered to the public despite full cooperation in good faith by all applicants or parties to achieve reasonable technical adjustments which would avoid electrical conflict.

Therefore, an initial determination must be made as to whether the Florida, Miller, or Microband applications are mutually-exclusive with Pompano's previously-filed modification application and KC's previously-filed initial application.

4. *Interference Studies.* Applicants for a new MDS station were required to file an analysis of the potential for harmful interference to any authorized or previously-proposed, cochannel MDS station within 50 miles of the applicant's proposed station transmitter. Thus, Florida, Miller, and Microband were required to file a study of the potential for harmful interference to the KC station and the Pompano station, as previously-proposed, pursuant to 47 C.F.R. Sec. 21.902(c).[4] Prior to the filing of the Florida, Miller, and Microband applications, the Commission specified the technical information these interference studies must contain, including a map showing the contour of a 45 dB carrier to interference ratio around both its proposed station and the KC station and around both its proposed station and the Pompano station, as previously-proposed in its modification application. However, the MDS applicant was to substitute an outline of the radio horizon for any point on the 45 dB contour line which is beyond the radio horizon.[5] It was announced that the contour calculation

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[1] This application was subsequently returned as unacceptable for filing. *See Dan S. Bagley*, 7 FCC Rcd 4002 (Dom. Fac. Div. 1992).

[2] Florida's application (File No. 3843-CM-P-80) was filed for Winterhaven, Florida. Miller's application (File No. 4374-CM-P-80) was filed for Auburndale, Florida. Microband's application (File No. 4531-CM-P-80) was filed for Winterhaven, Florida.

[3] The Pompano modification application was filed June 14, 1979, appeared on public notice June 25, 1979, and was granted July 22, 1980. The KC initial application was filed February 23, 1972, appeared on public notice March 6, 1972, and was granted April 1, 1980.

[4] At the time of the filing of the Florida, Miller, and Microband applications, 47 C.F.R. Sec. 21.902(c) required the filing, with each MDS application, of an interference study "of the potential for harmful interference with other stations, if the coordinates of the proposed transmitting antenna are located within fifty (50) miles of the coordinates of any authorized, or previously proposed, station(s) which utilizes, or would utilize, the same frequency."

[5] The radio horizon was described as where a free space propagation path exists over a 4/3 earth curvature surface.

must be made for a minimum of 24 points, separated by 15 degrees or less of azimuth, around each MDS station studied. *Public Notice, Interference Studies to Be Submitted by MDS Applicants Proposing Transmitting Antennas Located Within 50 Miles of the Location of the Transmitting Antenna of Any Authorized or Previously-Proposed MDS Station Operating on the Same Frequency*, Public Notice No. 18063 (June 1, 1979-CC); *see Public Notice, Attention MDS Applicants*, Public Notice No. 19898 (July 31, 1979-CC).

5. *Conflicts with Pompano Proposal.* We independently assessed the engineering studies provided by Florida, Miller, Microband and KC. Based on these engineering studies and our independent calculations, we find that the 45 dB contour of the signal from Florida's proposed transmitter, from Miller's proposed transmitter, and from Microband's proposed transmitter would overlap the Pompano station's 45 dB contour or the radio horizon of Pompano's licensed MDS station pursuant to its previously-filed modification application, producing harmful electrical conflicts. Therefore, Florida's MDS station as proposed in its application, Microband's MDS station as proposed in its application, and Miller's MDS station as proposed in its application would cause harmful interference, inside the 45 dB contour of Pompano's station at Tampa as proposed in its modification application. 47 C.F.R. Sec. 21.31(a).

6. *Cut-Off Period.* At the time the Florida, Miller, and Microband applications were filed, a cut-off period was established by 47 C.F.R. Sec. 21.31(b), which provided:

> An application will be entitled to comparative consideration with one or more conflicting applications only if: (1) The application is mutually exclusive with the other application; and (2) The application is received by the Commission in a condition acceptable for filing by whichever "cut-off" date is earlier: (i) Sixty (60) days after the date of the public notice listing the first of the conflicting applications as accepted for filing; or (ii) One (1) business day preceding the day on which the Commission takes final action on the previously filed application (should the Commission act upon such application in the interval between thirty (30) and sixty (60) days after the date of its public notice).

The cut-off periods had ended for the Pompano modification application at the time the Florida, Miller, and Microband applications were filed. KC argues that "[i]n view of the fact that Florida MDS's application was filed several years after the first of these dates, it is clear that the application should be dismissed as initially filed." KC Petition at 2. Because the Florida, Miller, and Microband applications were filed more than six (6) months after the cut-off period for the Tampa modification application, a previously-filed, mutually-exclusive application, the Florida, Miller, and Microband applications were untimely filed and are not entitled to comparative consideration with Pompano's Tampa application.[6]

7. *Untimely Filing.* The applicable mutual-exclusivity rule at 47 C.F.R. Sec. 21.31(d) also provides for the disposition of mutually-exclusive applications filed after the appropriate cut-off date. This rule provision provides, *inter alia:*

> An application otherwise mutually exclusive with one or more previously filed applications, but filed after the appropriate date prescribed in paragraph (b)(2) of this section, will be returned without prejudice.

Because each of the Florida, Miller, and Microband MDS applications are mutually-exclusive with the Pompano modification application, but were filed after the relevant cut-off date, the Florida, Miller and Microband applications must be returned as untimely filed, pursuant to 47 C.F.R. Sec. 21.31(d). *See Ashbacker v. FCC*, 66 S.Ct. 148 (1945).

8. *Conclusion.* Accordingly, pursuant to the foregoing discussion, the above-referenced MDS applications filed by Florida MDS, Inc., J. McCarthy Miller, and Microband Corporation of America ARE HEREBY RETURNED, without prejudice, as untimely filed pursuant to 47 C.F.R. Sec. 21.31(d). This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[6] We note that the Pompano Tampa modification application was granted many years ago without comparative consideration with either Florida's application, Miller's application or Microband's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

Champion Industries, Inc. — File No. 2727-CM-P-83 and 2714-CM-P-83

For Authority to Construct and Operate Multichannel Multipoint Distribution Service stations on the F-group channels at Columbus, Georgia and El Centro, California

ORDER ON RECONSIDERATION

Adopted: October 15, 1992; Released: October 22, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Champion Industries, Inc. (Champion) requested reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its applications for authority to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the F-group channels at Columbus, Georgia and El Centro, California, and requested reinstatement of its applications.

2. *Background.* As the result of Commission lotteries, the above-referenced applications were selected for qualification review. Subsequently, Division staff initiated a qualification review of each application pursuant to 47 C.F.R. Sec. 21.32, and upon examination, found the applications contained several deficiencies that precluded the staff from making a finding that Champion was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of either of its applications would serve the public interest. Champion was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of each letter.[1] Champion was also advised in each deficiency letter that failure to file the requested information within thirty days could result in the dismissal of its application.

3. With regard to its Columbus application, more than two (2) years later, Champion had provided none of the requested information. With regard to its El Centro application, more than 2 years and 7 months later, Champion provided some, but not all, of the requested information. Pursuant to 47 C.F.R. Secs. 21.13(c), 21.20(d) and 21.28(d), and by a letter dated more than two (2) years after the deficiency letters, the Division dismissed Champion's applications for failure to comply in a timely manner with the Division's requests for information. Champion argues that these two applications should be reinstated because: (1) it had spent money to comply with Commission rules, and (2) it intended at some unspecified future date to enter into a station time and capacity lease agreement with an unnamed lessee. Champion further argues that it should not have had to submit the information requested for its Columbus application because petitions to deny had been filed against some of its applications.

4. *Discussion.* As of the date of the Division's dismissal actions, Champion still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Champion had not submitted a lease, lease option agreement or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a) of the rules.[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement, or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. In addition, Champion failed to comply with the Division's requests to submit Section 21.902(i) ITFS noninterference analyses. At the time of the dismissals, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel

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[1] The deficiencies cited in the letter concerning Champion's Columbus application were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17(b); and (3) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i). The deficiencies cited in the letter concerning Champion's El Centro application were the absence of: (1) a public interest statement, pursuant to 47 C.F.R. Sec. 21.13(a)(4); (2) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (3) correct antenna structure height information for Federal Aviation Administration (FAA) air navigation hazard program compliance, as required by 47 C.F.R. Secs. 17.4(f) and 21.15(d); (4) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17(b); (5) nonaffiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (6) tariff schedule pursuant to Item 29 of FCC Form 435; (7) local maintenance showing, as required by 47 C.F.R. Sec. 21.15(e); (8) all of the information which should have been submitted initially on pages 5, 6 and 7 of FCC Form 435; (9) the interference avoidance showing, required by 47 C.F.R. Sec. 21.901(d)(7); and (10) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Even if Champion was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to submit a lease or option agreement after the Division directed Champion to submit the information in order to process its application. Section 21.13(a) provides *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*

ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific requests that these analyses be submitted by specified dates, Champion failed to submit the required analyses for more than two years after the analyses were requested. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).[4]

6. Champion had a duty to submit curative amendments to both applications within thirty days of the Division's written requests, or to obtain extensions of time. *Vision-Aire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failures to submit curative amendments for more than two years substantially impeded the expeditious offering of MMDS at Columbus and at El Centro. Also, Champion's failures to respond in a timely manner to the Division's requests for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissals, Champion had not provided the required ITFS non-interference analyses nor the required leases or option agreements. The Division was not in a position, therefore, to complete evaluation of Champion's MMDS station proposals and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

7. *Conclusion.* Having carefully considered all of the arguments and evidence presented, we find that the dismissal of these applications for failure to comply with the Division's requests for information was proper, reconsideration of those actions is not warranted, and reinstatement of the applications is not justified.[5] Accordingly, IT IS ORDERED that the requests for reconsideration and reinstatement submitted by Champion Industries, Inc. regarding the above-referenced MMDS applications ARE DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] Champion also failed to submit adequate financial and maintenance demonstrations, as required, for its El Centro application.

[5] Due to our disposition of Champion's requests for reconsideration, we hereby dismiss its motions for stay as moot.

Before the
Federal Communications Commission
Washington, D.C. 2055

In the Matter of the Application of

Whitney Communications Corp. File No. 15988-CM-P-83

For Authority to Construct and Operate Multichannel Multipoint Distribution Service station on the E-group channels at Augusta, Maine

ORDER ON RECONSIDERATION

Adopted: October 15, 1992; Released: October 22, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Whitney Communications Corp. (Whitney) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Augusta, Maine, and requested reinstatement of its application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of this application pursuant to 47 C.F.R. Sec. 21.32, and upon examination, found the application contained several deficiencies that precluded the staff from making a finding that Whitney was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Whitney was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of each letter.[1] Whitney was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Whitney provided some, but not all, of the information necessary to complete processing of its application. Pursuant to 47 C.F.R. Secs. 21.13(c), 21.20(d) and 21.28(d), and by a letter dated more than 17 months after the deficiency letter, the Division dismissed Whitney's application for failure to comply in a timely manner with the Division's requests for information. In its petition for reconsideration Whitney argued that its application should be reinstated because: (1) it had provided a second reasonable assurance statement of site availability; (2) it had submitted a second letter from Manufacturers Hanover Bank stating that the bank was willing to negotiate for financing of Whitney's MMDS station; and (3) the deficiency letter's dismissal warning should have been more explicit in cautioning Whitney concerning the potential for dismissal of its application for a failure to submit the ITFS interference analysis.

4. *Discussion.* As of the date of the Division's dismissal action, more than 17 months after the Division's request for information, Whitney still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Whitney had not submitted a lease, lease option agreement or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by 47 C.F.R. Sec. 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. In addition, Whitney failed to comply with the request to submit Section 21.902(i) ITFS non-interference analysis. At the time of the dismissal Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Whitney failed to submit the required analysis for more than 17 months after the analysis was requested. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

6. At the time Whitney submitted its second letter from Manufacturers Hanover Bank, 47 C.F.R. Sec. 21.17(e) required that a bank financing letter must provide loan

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[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement pursuant to 47 C.F.R. Sec. 21.15(a); (2) correct antenna structure height information for Federal Aviation Administration (FAA) air navigation hazard program compliance as required by 47 C.F.R. Secs. 17.4(f) and 21.15(d); (3) current financial qualification data pursuant to 47 C.F.R. Sec. 21.17; (4) transmitting antenna beam tilt specifications pursuant to 47 C.F.R. Sec. 21.906(a); (5) non-affiliation statement pursuant to 47 C.F.R. Sec. 21.900; and (6) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Even if Whitney was not required to comply with the requirements of Section 21.15(a), it was required pursuant to 47 C.F.R. Sec. 21.13(c) to submit a lease or option agreement after the Division stated in the deficiency letter that a lease or option agreement was required for qualification review purposes and requested Whitney to submit it. Section 21.13(a) provides *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.)*

details including: (a) commitment letter; (b) transaction terms; and (c) statement of compliance with ten-day default notice requirement. Whitney's bank letter instead merely indicated that the bank would be willing to negotiate with Whitney on financing. Thus, Whitney's submission failed to comply with Section 21.17 requirements.

7. Whitney had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time.[4] *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit all of the curative amendments for more than 17 months substantially impeded the expeditious offering of MMDS at Augusta. Also, Whitney's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Whitney had not provided all of the requested information. The Division was not in a position, therefore, to complete evaluation of Whitney's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

8. *Conclusion.* Having carefully considered all of the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified.[5] Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Whitney Communications Corp. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] The deficiency letter explicitly stated: "Your application must be amended to cure the listed deficiencies within 30 days of this letter's date. Failure to timely file this information could result in the dismissal of your application pursuant to Section 21.28(c) of the Commission's Rules." Thus, Whitney was provided sufficient warning in the deficiency letter that its failure to submit an amendment to cure any of its deficiencies, including a lack of ITFS analysis, could result in the dismissal of its application. In addition, Whitney certified in its original application that it was familiar with the Part 21 rules. The language of 47 C.F.R. Secs. 21.13(c), 21.20(d), 21.28(d), and 21.902(i) was clear that an MMDS applicant must submit its ITFS non-interference analysis at the time the Commission requests it.

[5] Due to our disposition of Whitney's petition for reconsideration, we hereby dismiss its motion for stay as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CHICO INDEPENDENT SCHOOL DISTRICT
Rosston, TX — File No. BPLIF-910603DA

SAINT JO INDEPENDENT SCHOOL DISTRICT
Saint Jo, TX — File No. BPLIF-911007DA

ALVORD INDEPENDENT SCHOOL DISTRICT
Bowie, TX — File No. BPLIF-911008DJ

For Construction Permit
and License in the
Instructional Television Fixed
Service on Channels B1, B2, B3,
and B4

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 1992; Released: November 9, 1992

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Chico Independent School District (Chico), Saint Jo Independent School District (Saint Jo), and Alvord Independent School District (Alvord), each seeking a construction permit and license on Channels B1-B4 in the Instructional Television Fixed Service (ITFS). The applicants propose to serve areas in Montague, Wise, Cooke, and Denton Counties in Texas and Love County in Oklahoma.

BASIC ELIGIBILITY

2. Chico, Saint Jo, and Alvord are each qualified to be an ITFS licensee. All three are school districts accredited by the Texas Education Agency applying within their jurisdictions to provide ITFS service to their students and the students of schools in neighboring school districts. Consequently, all three qualify as local applicants. Additionally, all three applicants have proposed some formal educational programming and are therefore qualified from a programming standpoint.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of 12 merit points based on five criteria deemed to be most relevant in selecting which applicant would be best qualified to provide the service for which the ITFS spectrum has been established. *ITFS Second Report and Order in MM Docket No. 83-523*, 101 FCC 2d 49, 65-72 (1985); 74 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdiction. Third, two points are awarded to applicants whose requests would result in the acquisition by that applicant of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[2] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Chico, Saint Jo, and Alvord are each awarded points based on the following criteria:

Localism. All three applicants are entitled to four points for being school districts serving schools within their respective districts.

Accreditation. All three applicants are entitled to three points for being accredited by the Texas Education Agency.

Four-Channel Limitation. None of the applicants is the licensee of other ITFS facilities or is applying for additional channels in their local areas other than the ones requested in the instant applications. Consequently, all three applicants are entitled to two points for remaining within the four-channel limitation.

Amount of Instructional Programming. Where amounts and types of programming proposed in an applicant's schedule and grid are inconsistent, we will consider as correct, for comparative purposes the amount and type which result in the lesser number of points to the applicant, so long as the excess capacity lease permits such a level of programming. Chico's illustrative schedule, as submitted with its applica-

[1] A "local" applicant generally is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order, supra* at p. 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

tion, proposes a per channel weekly average of 24.3 hours of educational programming. Because the schedule does not indicate which ITFS programs will be formal or which will be delivered to enrolled students for credit, as requested in Question 5, Section IV of the application, we will consider the programming on Chico's schedule as non-formal for the purpose of determining merit points. In contrast, Chico's programming grid proposes a per channel average of four hours per week of formal educational programming, and its excess capacity lease provides for a minimum of 20 hours of airtime per channel per week to be used for ITFS programming. Thus, Chico is entitled to no programming merit points.

Saint Jo's illustrative schedule, as submitted with its application, proposes per channel weekly averages of 11.5 hours of formal educational programming and 8.25 hours of other educational programming. In contrast, Saint Jo's programming grid proposes per channel weekly averages of 12.25 hours of formal educational programming and 8.25 hours of other educational programming. Saint Jo's lease for excess capacity provides for a minimum of 20 hours of airtime per channel per week to be used for ITFS programming. Because none of the amounts of programming proposed by Saint Jo reaches the threshold at which merit points are awarded, Saint Jo is entitled to no programming merit points.

Both Alvord's illustrative schedule and its programming grid propose a per channel weekly average of 20 hours of educational programming. The programming grid, however, indicates that the programming will be formal, while the schedule does not so indicate. Moreover, Alvord's lease for excess capacity provides for a minimum of 20 hours of airtime per channel per week to be used for ITFS programming. While there are inconsistencies in the types of programming proposed, none of the amounts of programming reported reaches the threshold at which merit points are awarded. Consequently, Alvord is entitled to no programming merit points.

E- and F- Channel Group Relocations. None of the applicants is the current licensee of E or F channels seeking to relocate to other channels. Consequently, this factor is inapplicable here.

Total. All three applicants are entitled to a total of nine points: four points for being local, three points for being accredited, and two points for observing the four-channel limitations. Consequently, we turn to our tie-breaker system to determine the winning applicant.

TIE BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are afforded an opportunity to negotiate an agreement regarding shared use of the channels. If no agreement is reached, as was the case here, each applicant must provide the number of students at its proposed receive locations who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[3] If any applicant's system would reach fewer than 80 percent as many students as another applicant's under the above-described procedure, its application will be denied. If there is a single applicant remaining, it will be declared the winner. Otherwise, the channels are divided evenly among the remaining applicants.

6. None of the three applicants submitted properly executed letters of intended use for receive sites outside their respective jurisdictions prior to the "B" cut-off date, which, in this case is December 30, 1991. Although Alvord did submit brief statements from some receive sites to the effect that they intended to use the ITFS programming, these letters do not provide the necessary detail required by Section 74.932, Note 2 of the our rules. Consequently, we will disallow all student figures for schools outside the applicants' own districts.[4] We will therefore credit Chico with 232 students, Saint Jo with 317 students, and Alvord with 425 students. Because the student figures credited to Chico and Saint Jo are each less than 80 percent of Alvord's figure, the selectee in this case is Alvord.

OTHER MATTERS

7. Alvord proposes to lease its excess capacity for non-ITFS use, as permitted by Section 74.931 of the Commission's Rules (47 C.F.R. Section 74.931), to Wise Electric Cooperative, Inc. Alvord has submitted a copy of the lease, which conforms in all respects with the Commission's requirements. Additionally, there are no petitions to deny Alvord's application, and no further review of Alvord's qualifications or proposal is necessary. Accordingly, we find that grant of Alvord's application would be in the public interest, convenience, and necessity.

8. Accordingly, IT IS ORDERED, That the above-captioned applications of the Chico Independent School District and Saint Jo Independent School District ARE DENIED, and the above-captioned application of the Alvord Independent School District IS GRANTED.

9. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

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[3] Only receive sites filed as of the "B" cut-off date may be used in determining the number of students served. *ITFS, Memorandum Opinion and Order in MM Docket No. 83-523*, 5 FCC Rcd 945 (1990). Moreover, applicants serving students other than their own must submit letters from those other receive sites indicating an intention to use the proposed service. Specifically, those letters must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2. Such letters of intended use must also be submitted by the "B" cut-off date to be considered in the tie-breaker procedure. 47 C.F.R. Section 74.911(c).

[4] We therefore do not reach Saint Jo's contention of May 7, 1992, that Chico has erred in the submission of student numbers for sites other than its own.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Extraordinary
Relief filed by Press
Television Corporation

MEMORANDUM OPINION AND ORDER

Adopted: October 1, 1992; Released: November 9, 1992

By the Commission:

1. Before the Commission is a "Petition for Extraordinary Relief" filed by Press Broadcasting Company, Inc. ("Press"), licensee of television station WKCF(TV), channel 68, Clermont, Florida. Press requests that the Commission rule that WKCF(TV) was a "local" signal in the Orlando-Daytona Beach-Melbourne-Cocoa television market for all purposes, including cable carriage under the mandatory signal carriage rules in effect on April 15, 1976, for the period between December 11, 1989 and November 13, 1991. The petition is unopposed. In view of the unique circumstances presented in this case, we shall grant the petition.

BACKGROUND

2. On December 5, 1989, the Commission granted relief requested earlier by Press to allow the station to be treated as part of the Orlando-Daytona Beach-Melbourne-Cocoa television market for purposes of the Commission's territorial exclusivity rules, 47 C.F.R. 73.658 (m), and thus, to enable it to exercise exclusivity against the other stations in this market for the non-network programming it purchases.[1] We concluded that, given the structure of that market and the location of the station within it, "there can be little doubt that WKCF(TV) is in fact unavoidably competitive with other stations in the market." Among the factors underlying this decision were that WKCF(TV)'s transmitter was some 30 miles east of Orlando (though Clermont itself was approximately 25 miles west of Orlando) and shared a common tower with a Daytona Beach station and that program suppliers treated the station as though it were in fact a part of this hyphenated market. For these reasons and "[t]o avoid the competitive difficulties which are exacerbated by an inflexibile application of the rule," we determined that a waiver was appropriate.

THE INSTANT PETITION

3. In the petition before us, Press notes that a station licensed to a community in a major television market listed in Section 76.51 of the Rules is deemed "local" in each of the designated communities within that market, not merely for section 73.658(m) purposes but for cable carriage and cable copyright related purposes as well. Such stations, according to Press, have been treated as "local" for purposes of the Commission's mandatory signal carriage ("must-carry") rules, syndicated exclusivity, and for cable copyright matters, aspects of which the Commission has recognized as interrelated and interdependent. Thus, the distinction between "local" and "distant" has implications for a station beyond the territorial exclusivity rule of section 73.658(m). Press argues that it is inconsistent to treat a station as a competitor in the market for section 73.658(m) purposes but not for cable signal carriage and related copyright purposes as well. This is especially important in this case because the goal in granting relief is to cure anomalous circumstances where a station is considered to be a competitor in the market but is not treated as part of the market under the Commission's rules.

4. Anomalous circumstances exist here, according to Press, because the Commission did not rule in granting the original waiver that WCKF(TV) was not also "local" for cable carriage and copyright purposes. Absent any clear indication that the station would not be considered local for carriage and copyright purposes, the station and local cable companies entered into cable carriage arrangements based on the belief that the signal would be considered "local" for copyright purposes. When the Commission indicated in the reconsideration order that a ruling on whether the station was local for carriage and copyright purposes had not been subsumed in the original order, cable operators lost their incentive to carry the station absent idemnification for potential accrued copyright fees from Press.[2] Thus, as a result of our previous decision WKCF(TV) is not treated as "local" for cable carriage or other purposes even though cable operators may carry signals of other stations licensed to the market without incurring copyright costs.

5. Press argues that, unless the Commission's ruling is extended to include WKCF(TV) as a "local" signal in the market for other purposes, its ability to compete in the marketplace on an "even playing field" with other stations in the market will be handicapped and the goal of the original waiver -- curing an anomalous situation -- will not be attained. It further claims that its previous waiver filings included the request that we find WCKF(TV) local for cable carriage purposes as well as territorial exclusivity purposes. Thus, Press requests that the Commission now clearly state that WKCF(TV) was a "local" signal in this market for all purposes, including cable carriage and copyright, for the period between December 11, 1989 (the release date of the original ruling) and November 13, 1991 (the release date of the reconsideration ruling).[3]

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[1] *Press Television Corporation*, 4 FCC Rcd 8799 (1989), *recon. denied*, 6 FCC Rcd 6563 (1991). Similarly, we emphasized that other stations in the market would not be precluded from exercising exclusivity rights against WKCF for their non-network programming.

[2] Cable operators in the market wishing to carry WKCF(TV) are liable for copyright "distant signal" fees unless and until the Commission rules that the signal is "local" to the market for cable carriage purposes.

[3] For the time period in question, Press has not raised any issues regarding protection under the cable television program exclusivity provisions of the rules, 47 C.F.R. Subpart F.

DISCUSSION

6. In acting favorably in the original decision, we believed that the relief provided therein would cure the problem highlighted by Press in its petition -- inclusion of the station in the Orlando-Daytona Beach-Melbourne-Cocoa major television market for purposes of the territorial exclusivity provisions of section 73.658(m). Although Press did mention the need for stations such as WKCF(TV) to be able to reach and fairly compete for audiences in the market in which they compete through exclusivity and cable carriage, it did not specifically emphasize the need for any other forms of relief other than the requested waiver of section 73.658(m). We thus assumed that the relief we had fashioned, based on the gravamen of Press' petition, would suffice in response to its petition.

7. Ordinarily, the relief we grant is limited to that specifically requested in the petition, assuming that sufficient public interest grounds have been set forth to justify such a grant. In the case at hand, there appears to be some confusion over the relief originally requested as well as the effect of the relief granted. Our overriding concern, however, is the public interest. Clearly, if anomalous circumstances still exist that bear upon the ultimate goal of service to the public, then we must determine whether additional relief is warranted.

8. As petitioner observes, we have already made the determination that WKCF(TV) should be considered "local to and a part of the Orlando-Daytona Beach-Melbourne-Cocoa market for purposes of section 73.658(m)." 4 FCC Rcd at 8801. The petitioner further reports that, based on this determination, cable systems carried WKCF(TV) under the assumption that it is also a "local" signal for cable carriage and copyright purposes. After reviewing petitioner's request for extraordinary relief, we are persuaded that, under the anomalous circumstances at issue here, there is no reason to treat WKCF(TV) as being "local" for purposes of our territorial exclusivity rule and not for our cable carriage rules during the period in question. The question in both cases is whether the station is "unavoidably competitive with the other stations in the market" -- a conclusion which we reached in the December 1989 *Press* order. We accordingly will grant petitioner's request and hold that WKCF(TV) was a "local" station in the Orlando-Daytona Beach-Melbourne-Cocoa market for cable carriage (and thus copyright) purposes for the period between December 11, 1989 and November 13, 1991.

9. At the same time, we emphasize that our action here is based on the unique circumstances presented by this case and is not intended to signal any departure from our general policy of redesignating television markets through rulemaking. We note in this regard that the petitioner has filed a Petition for Rulemaking formally requesting that Clermont be included in the Orlando-Daytona Beach-Melbourne-Cocoa television market which will be addressed separately.[4] Pending resolution of that rulemaking matter, Clermont will not be considered part of the Orlando-Daytona Beach-Melbourne-Cocoa market under section 76.51 of our rules.

10. Accordingly, IT IS ORDERED, that the "Petition for Extraordinary Relief" filed by Press Broadcasting Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[4] Any decision to redesignate the market as a result of the rulemaking process will be prospective only. This, however, does not affect our ruling today that WKCF(TV) was a local signal for cable carriage and copyright purposes between December 11, 1989 and November 13, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 92-89

ORDER

Adopted: November 2, 1992; Released: November 9, 1992

By the Chief, Accounting and Audits Division:

1. On September 30, 1992, BellSouth Corporation (BellSouth) filed revisions to its Cost Allocation Manual (CAM).[1] Included in the filing were revisions to Section VII, Time Reporting Procedures, to implement a statistical sampling process, referred to in the filing as the Work Activity Statistical Sampling Process (WASSP). Under the proposed revisions, WASSP would be used in place of time reporting for assigning certain field technician expenses to Part 32 accounts and Part 64 cost pools.

2. Absent a stay, revisions to the time reporting procedures specified in a CAM normally take effect 60 days following the submission of the revisions. However, in this instance, we believe that BellSouth's proposed revisions raise serious concerns, not only as to how costs associated with operating personnel are to be allocated between the regulated and nonregulated activities, but also as to how these costs are to be assigned initially to the appropriate Part 32 accounts. Because of these concerns, we will stay the effective date of these revisions until May 28, 1993. During this period we will review whether the revisions in Section VII comply with the Commission's accounting and cost allocation rules and policies. This stay is in accordance with the *BellSouth Order* which states that, "[P]roposed amendments to the manual will be deemed accepted unless the Common Carrier Bureau, pursuant to its delegated authority, stays the effectiveness of the change or rejects the change."[2]

3. Accordingly, IT IS ORDERED that the revisions to BellSouth's Cost Allocation Manual pertaining to Section VII, Time Reporting Procedures, filed September 30, 1992 ARE STAYED until May 28, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

[1] A Public Notice was issued to request public comment on BellSouth's CAM revisions (File Reference AAD 92-73) on October 6, 1992 (DA 92-1397).

[2] BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Cost, 3 FCC Rcd 128, 139 (Com. Car. Bur. 1988) (*BellSouth Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-35

In the Matter of

BROWN COMMUNICATIONS

Licensee of Station WKIJ(AM)
Parrish, Alabama

Order to Show Cause
Why the License for
Station WKIJ(AM), Parrish,
Alabama, Should Not Be Revoked

Appearances

Kathryn M. Swisher, Esq., on behalf of Brown Communications; *Charles E. Dziedzic, Esq.* and *Y. Paulette Laden, Esq.*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: November 2, 1992; Released: November 12, 1992

PRELIMINARY STATEMENT

1. This proceeding was commenced on March 26, 1992, by *Order To Show Cause And Hearing Designation Order*, FCC 92-85, reported at 7 F.C.C. Rcd 2135 (Comm'n 1992). The show cause order is based on a charge made by the Mass Media Bureau ("Bureau") that Station WKIJ(AM) has been off the air without authority since January 21, 1991. Brown Communications, the station's licensee, was ordered by the Commission to show cause why its license should not be revoked or if the hearing record does not warrant a revocation, whether an order of monetary forfeiture shall be issued.

2. The issues set for adjudication are as follows:

(a) To determine whether Brown has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Brown is qualified to be and remain the licensee of Station WKIJ(AM).

The burden of proceeding and the burden of proof are assigned to the Bureau. *Id* at Para.5. *See also* 47 U.S.C. Section 312(c) and (d). On April 16, 1992, the Bureau issued the required Bill Of Particulars which was served on Brown Communications. On May 1, 1992, the Bureau filed and served a Request For Admissions to which Brown timely responded on May 6, 1992. (Bur. Exhs. 12, 13.)[1]

3. A prehearing conference was set in the assignment order for May 27, 1992. *See Order* FCC 92M-398, released March 31, 1992. A prehearing conference was held in which Brown's principal, at that time appearing *pro se*, was permitted to participate by speakerphone. *See Order*, FCC 92M-559, released May 14,1992. A hearing was set for June 29, 1992, the hearing was held as scheduled, and the record was closed on June 29, 1992. The parties were ordered to submit Proposed Findings Of Fact And Conclusions Of Law ("PFC") on August 21, 1992, and Reply Proposed Findings Of Fact And Conclusions Of Law ("RPFC") on September 18, 1992. *See Order*, FCC 92M-736, released July 1, 1992. Brown retained local counsel to assist in the preparation of findings. Counsel requested additional time to prepare findings. There was no objection interposed by the Bureau and for cause shown, the filing dates were extended to September 4, 1992 and October 2, 1992, respectively. *See Order* FCC 92M-911, released August 24, 1992. The Bureau has filed a complete round of pleadings. Brown Communications filed only its Proposed Findings of Fact and Conclusions of Law.

4. Under the findings and conclusions of the Presiding Judge as made below, the sole remedy to be imposed in this case is revocation. It is noted that the Bureau posits in its PFC that if revocation is ordered a forfeiture need not be imposed. Since the *Order To Show Cause And Hearing Designation Order, supra*, Para. 7, sets a forfeiture issue in the disjunctive should there be no revocation, there is no basis under these findings and conclusions to consider a forfeiture.

FINDINGS OF FACT

5. The licensee is a limited partnership organized under the laws of the State of Alabama. (Brown Exh. 7.) The general partners are Jimmy Dan Brown ("Brown") and his wife Sherry Ann Brown. (*Id.*) There are three limited partners who are relatives of Brown. Brown is the station manager who is responsible for the day-to-day operation of the station and the principal who represented the licensee in the hearing phase of this case. (Brown Exh. 9.)

6. Station WKIJ(AM) went on the air in September 1983. (Brown Exh. 9.) The original transmitter site was on leased land and the last lease document was signed on July 15, 1988. (Brown Exh. 8.) The lease had a one year option after which the licensee would become a tenant at will. The landlord terminated the lease relationship in July of 1990 but permitted Brown to continue as a month-to-month tenant. (Tr. 194-96.) It later became necessary for Brown to move to another site and in doing so, he intended to improve the strength of the station's signal. (Brown Exh. 9 at 2.)

[1] The Request For Admissions and the Admissions were received in evidence. (Bur. Exhs 12, 13.) *Cf. Oliver Kelley et al.*, 7 F.C.C. Rcd 4239 (Comm'n 1992) (answers to interrogatories must be admitted in evidence to qualify for consideration in findings.)

7. However, for strictly economic reasons that were unrelated to the loss of the lease, on June 24, 1990, Brown took the station silent. Brown informed the Commission in writing on June 25, 1990, after the fact, that he was making a request:

> [t]o remain silent until [we] can restructure (sic) our finances, and or sale (sic) WKIJ.

(Bur. Exh. 1.) At that time, technical modifications were not contemplated by Brown. (Tr. 231.) By letter dated July 9, 1990, the Commission's AM Branch granted Brown Communications and WKIJ(AM) a temporary authority to remain silent through October 9, 1990. (Bur. Exh. 2.)

8. On October 8, 1990, Brown requested an extension of the authorization to keep the station silent because there was no qualified purchaser yet to be found and because Brown had ascertained that there was no market for a 1 kw daytime only AM station in the Parrish market. (Bur. Exh. 3.) Brown went on to report in that same letter that on October 5, 1990, he had been notified that the lessor was not renewing the lease on the antenna site and that therefore, Brown was requesting a field test for the purpose of relocating the antenna tower for that reason and in order to increase the station's power. By letter dated October 30, 1990, the Commission's AM Branch again granted Brown Communications and Station WKIJ(AM) a temporary authority to remain silent through January 21, 1991. (Bur. Exh. 4.) However, that letter advised Brown that an FCC Form 301 was required to be filed for relocation of the tower and for an increase of power. Also, in that letter Brown was advised that any further request for an extension of authorization to remain silent must be accompanied by a progress report. (*Id.*) No Form 301 was filed and no such progress report was submitted.

9. On November 9, 1990, Brown wrote in separate correspondence to the Commission's Mass Media Bureau that he was requesting a waiver on behalf of the licensee of the then present freeze on the AM band so that Brown might complete field test measurements and expedite a return of the station to the air. (Brown Exh. 2.) Brown had concluded that the contemplated change to increase the station's power would make the station more marketable. (Tr. 225.) By *Order* FCC 90-112, released March 29, 1990, the Commission had imposed a freeze on the acceptance of applications for new AM stations and for major changes in existing AM stations. *See Review Of The Technical Assignment Criteria For The AM Broadcast Service*, 5 F.C.C. Rcd 2136 (Comm'n 1990). But there were exceptions to the freeze for applications for minor changes necessitated by causes beyond the control of an applicant, such as the unavoidable loss of a transmitter site. (*Id.*) (Bur. Exh. 18.) Brown contends that Station WKIJ(AM) could not make use of this exception because the station required a major change. (Bur. Exh. 4; Tr. 206, 225.) The freeze was removed on April 19, 1992. (Bur. Exh. 19.) There has been no Form 301 application filed by the licensee to change the station's facilities since 1986. (Bur. Exh. 17; Tr. 220,230.)

10. Brown had requested authorizations to remain silent and the Commission granted temporary authority until January 21, 1991. (Bur. Exh. 4.) Brown also received authority to conduct field tests at the new location until February 28, 1991. (Bur Exh. 5.) Brown had sought the authorization to field test on November 9, 1990, and the first authorization was granted on December 18, 1990, approximately one month before the authorization to remain silent was to expire. (Bur. Exh. 5.) Brown made no further requests for an authorization to remain silent.

11. On April 25, 1991, Brown wrote to the Commission and requested a ninety (90) day extension of the authorization to complete field strength measurements. (Bur. Exh. 6.) Brown represented that the tests had not been completed during the earlier authorization because of inclement weather. (*Id.*) By letter dated May 16, 1991, the Commission's AM Branch responded to Brown at P.O. Box 1332, Jasper, Alabama, and the Branch again extended the authorization to continue field testing until August 31, 1991. (Bur. Exh. 7.) That letter contained an admonition to Brown to "more closely observe the expiration dates of temporary authorizations." (*Id.*) However, there was no extension of the authorization to remain silent which had expired on January 21, 1991. Thereafter, by formal letter dated June 24, 1991, the Chief, Audio Services Division wrote to the licensee at 314 Highway 78 By-Pass, Jasper, Alabama and, noting that the station had been off the air since January 21, 1991, requested copies of authorizations. (Bur. Exh. 10.)[2] In that letter, Brown was advised that a failure to submit a showing sufficient to justify an extension of an authority to remain silent could result in the cancellation of Brown Communication's license. (*Id.*) The Bureau also introduced evidence showing that in December 1988, Brown had filed on an appropriate form, a notice of a change of address which reported the licensee's address at 314 Highway 78 By-Pass, Jasper, Alabama. (Bur. Exh. 11.) Brown testified that he had not received the aforementioned letter of June 24, 1991. (Tr. 179-81.) But the address provided by Brown in December 1988 was not changed until April 27, 1992.[3] In addition, as recently as April and May, 1992, Brown has actually received mail that was addressed to the Jasper location at the Highway 78 Bypass address. (Bur. Exhs. 15, 16; Tr. 180-81.) There also is evidence in the record which establishes that U.S. postal authorities have forwarded mail to Brown that was addressed to the 78 Bypass address. (Brown Exh. 1 at 3.7.) Brown is conclusively presumed to have received the letter of June 24, 1991 which is the Bureau's Exhibit 10.

12. On August 16, 1991, Brown wrote to the Commission noting that the relocation of WKIJ(AM)'s transmitter constituted a "major change" to the station. (Bur. Exh. 8.) Based on that assertion, Brown requested that the Commission grant "an extension until the freeze is lifted." (*Id.*) The Commission's AM Branch responded by letter dated August 29, 1991, and advised Brown that "your temporary authority for special field test for Radio Station WKIJ (AM) will not be extended unless you submit an acceptable status report outlining your progress." (Bur. Exh. 9.) Brown was allowed ten days within which to submit a

[2] There is evidence in the record showing that two pleadings were served on two separate occasions by Bureau Counsel addressed to Brown at 314 Highway 78 By-Pass, Jasper, Alabama 35501. Brown acknowledged receipt of those items by signing and returning a return receipt form. (Bur. Exhs. 15, 16.)

[3] By that latest change the licensee's address is now stated to be 4002 McIngvale Road, Hernando, Mississippi 38632. (Bur Exh. 14.)

status report. And there was no authority to remain silent in the Bureau's letter of August 29, 1991. (Id.) However, that letter (Bur. Exh. 9) was misaddressed to Brown at Pittsburgh, Pennsylvania and Brown did not receive that letter. (Tr. 175, 177-78.) Brown asserts that since he did not receive a reply to his August 16 letter, he assumed that he was in compliance due to the freeze on AM applications and that he had an implied authority to remain silent until the freeze was lifted. (Brown PFC at 10.)

13. Effective April 19, 1992, the Commission lifted the AM freeze. (Bur. Exh. 19.) Brown has not yet filed a Form 301 application to change the station's facilities. (Bur. Exh. 17; Tr. 220,230.) As of the date of the hearing, Brown testified that the application for change of location and increase in power was still being worked on and was near completion. (Tr. 208,228.) However, Station WKIJ was still silent. (Tr. 220,230.) Brown relies on his letter of August 16, 1991, wherein he requested to be accorded the protection of the AM freeze and he argues that since he had not received an answer to that letter, he appropriately assumed that he had authorization for the station to remain silent. (Brown PFC at 10 and Tr. 239, 242.)

14. Brown testified that prior to receipt of the Commission's show cause order, he first learned through an employee of an engineering firm that the Commission would proceed against the licensee for its unauthorized silence. (Tr. 143; Brown Exh. 9; Brown PFC at 3.) The Commission's designation and show cause order was released on March 26, 1992, and there is no assertion that Brown did not receive a timely notice of these proceedings. It is found as a fact based upon substantial evidence in the record that the licensee had received written authorizations from the Bureau to remain silent from June 24, 1990, until January 21, 1991. (See Bur. Exhs. 2, 4.) It is further found that thereafter, commencing January 22, 1991, through the date of the hearing, June 29, 1992 and to the present the licensee has remained silent without authorization.

15. The following facts are considered in finding that Brown knew or should have known that his authorization had expired on January 21, 1991. As of December 1988, the Bureau relied on the address form which had been submitted by Brown that reported the licensee's current address at 314 Highway 78 Bypass, Jasper, Alabama. The Commission's letter dated June 24, 1991 (Bur. Exh. 10) was mailed to that address and Brown and the licensee are conclusively presumed to have received it. The station was already silent by virtue of two authorizations since June 24, 1990. (Bur. Exhs. 2, 4.) Brown knew that Commission authorization was needed to remain silent and yet Brown failed to take any positive steps to seek authorization to maintain the station in a silent condition after January 24, 1991. Rather, after being specifically informed by the Commission that the station's authorization to remain silent would terminate on January 21, 1991 (Bur. Exh. 4), Brown acted on an unverified and therefore unreasonable assumption that the AM freeze could operate as an implied authorization for the station to remain silent.

16. Brown Communications asserts certain peripheral matters in mitigation that are noted by the Presiding Judge. Mr. Brown has shown that he had an interest in broadcasting. He worked for six years at a television station in Greenwood, Mississippi and he is currently employed at Station WREG-TV in Memphis, Tennessee. (Brown Exh. 9.) Brown had installed part time employees at WKIJ(AM), who were his relatives, while he worked in Memphis. Brown worked at the TV station during the regular work week and he worked at the AM station on weekends. Mrs. Brown has a job at a local bank and she also worked part time at the station when it was operating. It was a family venture that was unable to support a full-time staff while experiencing a short fall in advertising sales. (*Id.*) When the station lost its lease, Brown decided to move it to a parcel that he owned and to increase its power. In that way, Brown hoped to either obtain more advertising revenues or to increase the value of the station for a sale. There is no evidence to establish that there was an abrupt unexpected cancellation of the lease. Rather, the evidence shows that the station went silent on June 24, 1990, because the station was losing money and it was not returned to the air because Brown's business plan to improve the station for sale could not be accomplished.

17. There were two extensions granted to remain silent and additional extensions may have been granted if Brown had provided a status report that showed progress in response to the Bureau's letters of October 30, 1990 (Bur. Exh. 4) and of June 24, 1991 (Bur. Exh. 10). While it is found that Brown did not receive the Commission's letter of August 29, 1991, which was sent to Pittsburgh by error (Bur. Exh. 9), the earlier letter of June 24, 1991, was clear and explicit notice that Brown Communications must comply with Section 73.1740 of the Commission's rules regarding the minimum schedule of broadcast operation. That letter of June 24 was sent to the address that Brown had advised the Commission was the correct address for the licensee. The evidence also fails to disclose that Brown took any initiative to assure that he received a written extension from the Commission staff after the authority to remain silent had expired on January 21, 1991. It was unreasonable for Brown to rely on the AM freeze for any implied authorization to remain silent. In that regard, it is noted that correspondence from the Commission concerning the freeze were in the context of field testing, including the Bureau's misdirected letter of August 29, 1991. (Bur. Exh. 9.) A consequence of Brown's unreasonable assumption and equally unreasonable failure to remain informed is the manner in which he first learned through an engineer that WKIJ(AM) was on a Commission list of stations that could lose their licenses. (Brown Exh. 9.)

18. There were two occasions in which there were contacts between Brown and the Commission wherein he was not told that the station was silent without authorization. In late 1991, he received emergency broadcast data for the first three months of 1992. (Tr. 133-34.) And in May 1992, he was requested by a Commission employee to submit a current ownership report. Brown asked for the appropriate report form which was sent to him and which he submitted. (Tr. 168.) In none of those contacts did a Commission employee advise or refer to any authorization to remain silent. (Tr. 206.) Brown suggests that by the absence of a warning from the Commission staff, he was lulled into believing that he had been authorized to maintain the station in a state of silence after January 21, 1991. It was unreasonable for Brown to assume that he would be advised by Commission staff in a telephone conversation concerning an ownership report of his obligations with respect to the station's operation. It was equally unreasonable for Brown to assume that the absence of volunteered advice by the Commission staff inferred an authorization to remain silent. And there is no evidence that Brown affirmatively raised the question with a Commission employee or that Brown was affirmatively misled by anyone.

19. Brown also was in the process of negotiating with a third person and some businessmen for the possible barter of broadcast time for religious programming. Those negotiations began in late 1991 when the field testing was being delayed by inclement weather. The negotiations continued to the time that the show cause order was released. (Tr. 202-06.) The negotiations and the work on field testing ceased with the issuance of the show cause order on March 26, 1992. (*Id.*) Those circumstances, which are advanced by Brown Communications, are probative of the fact that Brown had received timely notice of the possible loss of the station before any commitment was made for bartered time. Therefore, there are no equities to consider, such as estoppel, with regard to actions taken by Brown and third persons in reliance on an assumed authorization to remain silent by way of the AM freeze. However, the fact that Brown was seeking barter arrangements while the station was silent evidenced an intent to ultimately resume operations. Therefore, it is found that Brown did not intend to abandon the station.

20. Brown continues to assert that since June 24, 1990, he was diligently seeking to obtain authority to enhance the station's power and that he had therefore not abandoned the station. (Tr. 212-13.) In preparation for filing an application to increase the station's power, Brown was in the process of preparing a contour map and overlay and documents showing that there would be no interference with the signal of other broadcast stations. (Tr. 209.) Brown contends that he was working on those documents for a period of from three to four months. (Tr. 211.) He claims to have spoken with the Chief of the AM Branch who advised Brown that his application to enhance the station's power would not be favorably considered while the show cause proceeding was pending. (Tr. 211-12.) In view of such advice from the Commission staff, there was no basis in fact for Brown to rely on any assumed authorization to continue to permit the station to remain silent. However, such positive steps to prepare for a new site is additional evidence that Brown did not intend to abandon the station.

CONCLUSIONS OF LAW

21. This proceeding has been set for hearing in accordance with the Communications Act of 1934, as amended, under its provisions at 47 U.S.C. Section 312. The relevant Commission rule is as follows:

> In the event that causes beyond the control of the licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

47 C.F.R. Section 73.1740(a)(4).

22. The Commission's rules also provide:

> The licensee---shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

47 C.F.R. Section 73.1750. Brown Communications admits that it has not submitted its license to the Commission for cancellation. (Bur. Exh. 13.) But Brown never intended to permanently discontinue the station's operation and he continued to attempt to restore its operation at a new site. Therefore, the licensee is not in willful violation of Section 73.1750 of the Commission's rules.

23. For reasons stated below, it is found by substantial evidence that Station WKIJ(AM) has been silent since June 24, 1990, and that such silence was without authorization since January 22, 1991. Also, it is found that the licensee has failed to adhere to its operating schedule since January 22, 1991, without authority from the Commission to remain silent. In addition, during the period January 22, 1991, to the present, the licensee has effectively discontinued the operation of Station WKIJ(AM) without Commission authorization. However, it is concluded that the preponderance of the evidence does not establish that Brown Communications permanently discontinued its operation of Station WKIJ(AM). Therefore, it cannot be determined that Brown Communications was required to forward its license and other instruments of authorization to the Commission.

24. The Bureau contends that the licensee had authorization to remain silent only until January 21, 1991, and that Brown never sought an authorization to remain silent beyond that date. *See* Bureau PFC at 9. The Bureau is correct for the following reasons. The applicable rule provides that where a station cannot operate for causes beyond its control, it may discontinue its operations up to thirty days without authorization and, if time is needed beyond the first thirty days, Commission authorization is required to be sought by written request. 47 C.F.R. Section 73.1740(a)(4). The last authority to remain silent that the Commission granted to Brown was in the letter dated October 30, 1990, from the Chief, AM Branch wherein temporary authority was granted to remain silent only until January 21, 1991. (Bur. Exh. 4.) All requests from Brown thereafter and all authorizations from the Bureau's AM Branch were concerned with authority to conduct field tests and not with any authority to remain silent.

25. The Bureau further argues that the silence of Station WKIJ (AM) after January 21, 1991, was not the result of causes beyond the control of the licensee. *See* Bureau PFC at 8. The Bureau is also correct in that respect. The lease under which the station was operating expired in July 1990. Brown went on a month-to-month tenancy as an interim measure while he established a new location. Brown was given two successive authorizations to remain silent in order to move to a new location and either find a purchaser or return to the air. Brown did neither by the expiration of the last extension. Nor did Brown submit a status report as required by the Bureau or specifically seek

a further extension of an authorization to remain silent. Brown admitted that he wanted to upgrade the station's power at the new site in order to attract a purchaser. Brown also was actively involved in negotiations for the barter of time until he received notice of these proceedings. He had an interest in remaining silent because it gave him an opportunity to optimize his search for new advertising clients and to simultaneously attempt to locate a purchaser. However, he required a further temporary authorization from the Commission to remain silent after January 21, 1991. That authorization was neither sought nor granted. Instead, the Commission instituted this proceeding. Thereafter it became illegal to assign the station license to a purchaser because the station was in a revocation proceeding. *See Jefferson Radio Co.* v. *F.C.C.*, 340 F.2d 781 (D.C. Cir.1964).

26. The irremedial defect with Brown's case is the lack of substantial evidence which would peculiarly be in his possession showing all prepatory steps taken to move the tower site to the new location and to obtain the necessary FAA clearance so that Station WKIJ(AM) could return to the air by January 21, 1991. If for reasons beyond his control Brown was unable to effect the move, obtain the clearance and return to the air by January 22, 1991, then it was up to Brown to obtain the additional authority from the Bureau to remain silent past that date, a remedial procedure which Brown failed to pursue. In order to obtain the necessary relief from the Bureau it'was essential that Brown submit meaningful progress reports. The Bureau could not react favorably to Brown's needs in a vacuum. Thereafter, on or about June 24, 1991, Brown was given formal notice by the Chief, Audio Services Division that the station was deemed to have been off the air without authority since January 21, 1991. Brown was specifically warned by the Chief of the Division that a failure to respond or to submit a showing sufficient to justify an extension of authority to remain silent could result in a cancellation of the station's license. That letter was sent to the licensee's address of record and it is presumed conclusively to have been received by Brown. Yet Brown never responded to the matters raised in that letter or, if he did not know of the letter, Brown failed to affirmatively contact the Bureau to ascertain the information needed to satisfy Brown's need for an extension of authority to remain silent.

27. Fortuitously, in March 1990 the Commission had ordered a freeze on applications for AM broadcast stations, including applications for major changes. *See Review Of The Technical Assignment Criteria, supra.* In connection with the intended move to a new site and increase of the station's broadcast power, Brown Communications would need to file an application for major change on Form 301. The freeze criteria permitted an exception for minor changes where the changes were necessitated by causes beyond the control of the applicant. But there is no evidence to show that Brown could have brought the station back on the air by January 22, 1991, with minor changes. The move and the contemplated power increase were in fact major changes.[4]

28. Also, there still remained a requirement for Brown to fully respond to the Commission's demand for a status report and to the Bureau's letter of possible cancellation dated June 24, 1991, in order for the licensee to be considered for further authorization to remain silent beyond January 21, 1991. The Commission provided substantial opportunity for Brown to show why he should receive further authority to remain silent. Yet Brown failed to submit a status report, failed to make an additional informal request for authorization for silence, and unreasonably assumed that he could maintain the station in a silence mode by virtue of the AM freeze. The AM freeze was lifted on April 19, 1992 (Bur. Exh. 19), yet as of the date of the hearing, June 29, 1992, there was no Form 301 application filed by Brown Communications and the licensee was not prepared to file a Form 301.

29. There has been consideration given by the Presiding Judge to mitigation factors urged by Brown. It is recognized that the station has been operated as a family business since 1983 and that Brown had an interest in succeeding as a broadcaster. However, the station was operating under a short term lease and Brown should have anticipated that it might not be renewed. The efforts that he was making to move the antenna site and increase the power were efforts to increase the value of the station for the purpose of sale. This is evidenced by Brown's own admissions, the advice that Brown was giving to the Commission in his requests for authorization to remain silent, and in the more recent negotiations for barter time. The evidence establishes that while seeking to make those improvements, Brown maintained the station in a state of silence without Commission authorization since January 22, 1991. Also, there is no evidence to show that Brown was ready and able to file a Form 301 for the contemplated major changes when the AM freeze was lifted on April 19, 1992. In short, after receiving authorization to conduct field testing at the new site, Brown ceased to communicate any substantive data to the Commission on the status of the move to a new site, his contacts with FAA, the progress of his testing, and the preparation of a Form 301. Therefore, it is concluded that Brown elected to continue to maintain the station in a condition of silence while he sought to make improvements for personal business reasons that were not related to the public interest and while remaining indifferent to the lack of Commission authorization. The Commission will not permit the retention of a license to broadcast under such circumstances. *See KQED, Inc.*, 5 F.C.C. Rcd 1784 (Comm'n 1990), *recon. denied*, 6 F.C.C. Rcd 625 (Comm'n 1991) (license revoked notwithstanding good broadcast record where licensee left the air for business reason without authorization). Therefore, the appropriate remedy to impose here against Brown Communications is revocation for willful violation of the Commission's rule Section 73.1740 as charged by the Bureau.

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[4] The rules for processing AM broadcast applications identify a "major change" as any increase in power or any change in station location. 47 C.F.R. Section 73.3571 (a)(1). The Bureau was at all times assuming that Brown Communications would be making major changes in relocating the tower. That conclusion is evidenced in the letter from the Chief, AM Branch dated October 30, 1990, stating that temporary authority was being granted to remain silent through January 21, 1991, "to allow time to locate a qualified buyer, and relocate tower." (Bur. Exh. 4.) That letter was mailed to the licensee's address of record. And that was the same letter in which the Bureau required a report of progress "toward resumption of operation" which Brown failed to submit. Brown admits to receiving the letter of October 30, 1990. *See* Brown PFC at 8-9.

ULTIMATE FINDINGS AND CONCLUSIONS

30. Due to an absence of revenue, Brown took Station WKIJ(AM) off-the-air on June 24, 1990, without first obtaining Commission authorization. Immediately thereafter he sought and received authorization to remain silent for approximately three and one half months so that he could obtain financing or find a qualified buyer. Brown later was notified in October 1990 that his site lease would not be renewed. He owned a plot of land which was to be used as the new site. Brown saw the situation as presenting an opportunity to increase the output power of the station from 1 kw to 5 kw which would either enhance advertising revenue for Brown or would improve the opportunity for a profitable sale. There was nothing illegal about Brown's scheme so long as he abided by the Commission's rules. Twice the Bureau responded positively to the request. But the last authorization expired on January 21, 1991, and Brown did not follow up in seeking further authorizations. He knew from the correspondence with the Commission that he would need to file a Form 301 for the major changes and he also knew from the correspondence that the Bureau both demanded and expected an informative progress report. The burden was on Brown Communications to respond to the Bureau's need for meaningful information if favorable extensions of time were to be expected. In fact, Brown was warned to avoid permitting authorizations to approach expiration dates before requesting an extension.

31. Brown knew or had sufficient reason to know as a Commission licensee that the authorization to remain silent expired on January 21, 1991. Rather than seeking to pursue and justify a reasonable further extension of the authorization, Brown either deliberately, or without sufficient inquiry, used two unrelated regulatory developments to attempt avoiding the fact that the authorization to remain silent had expired on January 21, 1991. First, Brown was simultaneously seeking authority to conduct field testing at the new site incident to the contemplated move and the possible increase in power. Second, the Commission had established a freeze on the filing of new AM applications for major changes. Brown used the first unrelated event to argue that he thought that the Bureau was granting him further authority to remain silent. But as noted in the findings above, the Bureau made no mention of extending the authorization to remain silent in correspondence relating to field testing and requests by Brown for additional time within which to conduct field tests. Again, if Brown had made timely and responsive status reports which the Bureau was seeking, Brown may have avoided the violation. With respect to the freeze, Brown only requested a waiver of the freeze in conjunction with requests for more time to complete field testing. The Bureau was cooperative in granting two of those requests but Brown persisted in failing to submit a status report. Thus, the AM freeze was merely an attendant circumstance to the quandary that Brown had created. It had no relevance to the fact that Brown had ceased to operate the station without authorization on and after January 22, 1991.

32. Brown Communications, a Commission licensee, has not made any showing that it had been misinformed or affirmatively misled in its unauthorized silencing of Station WKIJ(AM) after January 21, 1991. Brown was on written notice that January 21, 1991, was the last extension and Brown took no steps to affirmatively seek a further authorization to maintain silence or to acknowledge the Bureau's requirement for progress reports. Such inaction and inattention on the part of a Commission licensee cannot be accepted where the outcome is a discontinuance of use of an allotted frequency. See *Midwest Radio Television, Inc.*, 45 F.C.C. 1137, 1141 (Comm'n 1963) (Comm'n demands high standards from licensees where violations can be avoided; laxity on the part of a licensee can result in a sanction and wilfullness need not be shown where a licensee knows that it is doing the act in question). Here, in the absence of a written authorization from the Bureau to remain silent, Brown's conduct in seeking a business opportunity relating to the station without giving the Bureau the progress report to which it was entitled was an intentional act of defiance which, at a minimum, showed a laxness for compliance with the Commission's rules that cannot be tolerated. If Brown Communications were allowed to retain its broadcast license under these circumstances, the high standards demanded by the Commission of its broadcast licensees could be substantially diminished.

33. Since revocation is an appropriate remedy there is no basis to consider a monetary forfeiture. *See* Para. 4, *supra*. Although Brown was in violation of the Commission's rule concerning the station's operation, the evidence does not support a finding under the standard of *Midwest Radio-Television, supra* that there was a knowing permanent discontinuance of the operation of the station. *See* 47 C.F.R. 1750 (Commission to be notified and license to be returned where there is a "permanent discontinuance of operation"). The evidence indicates that Brown would continue to operate Station WKIJ(AM) after he succeeded in moving the tower site and increasing the power, or that Brown would succeed in his efforts to obtain a qualified purchaser who would operate the station. The record does not support a finding of an abandonment of the station or an intentional permanent discontinuance of its operation. The discontinuance would be temporary until Brown could return to the air with increased power or until a qualified purchaser was located. However, even without a violation of Section 73.1750, there is a sufficient basis in this record to revoke the license of Brown Communications.

ORDER

IT IS ORDERED pursuant to Section 312 of the Communications Act of 1934, as amended [47 U.S.C. Section 312] that the AM broadcast license of Brown Communications for Station WKIJ(AM) at Parrish, Alabama IS REVOKED.[5]

[5] This *Initial Decision* of the Presiding Judge shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. Section 1.276(d).

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

VALLEY VIEW INDEPENDENT SCHOOL DISTRICT
Rosston, TX — File No. BPLIF-910603DI

PARADISE INDEPENDENT SCHOOL DISTRICT
Bowie, TX — File No. BPLIF-911008DK

SIVELLS BEND INDEPENDENT SCHOOL DISTRICT
St. Jo, TX — File No. BPLIF-911008DY

For Construction Permit and License in the Instructional Television Fixed Service on Channels C1, C2, C3, and C4

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 1992; Released: November 10, 1992

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Valley View Independent School District (Valley View), Paradise Independent School District (Paradise), and Sivells Bend Independent School District (Sivells Bend), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels C1-C4 in the Valley View, Texas area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Valley View, Paradise, and Sivells Bend. All three applicants are qualified to be ITFS licensees. They are governmental organizations engaged in the formal education of enrolled students, and they are accredited by the Texas Education Agency. Although they all propose to serve students outside their districts, because they also propose to serve schools within their own districts, they qualify as local applicants.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards predetermined merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service-Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d at 65-72; 47 C.F.R. §74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, Valley View, Paradise, and Sivells Bend are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant, accredited by the Texas Education Agency, is entitled to three points for accreditation.

Four-Channel Limitation. None of the applicants is the licensee of, or has filed applications for, additional ITFS channels in the Valley View area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be

[1] A "local" applicant generally is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[2] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

transmitted. Valley View's illustrative schedule proposes an average of 24.375 hours of ITFS programming per channel per week. Because the schedule does not indicate which ITFS programs are formal, or those to be delivered to enrolled students for credit, as requested in Question 5, Section IV of the application, we will consider the programming on Valley View's schedule as non-formal for the purpose of determining merit points. In contrast, its programming grid proposes an average of four hours of formal educational programming per channel per week.[3] Thus, Valley View is entitled to no programming merit points.

The illustrative schedule for Paradise proposes an average of 20 hours of ITFS programming per channel per week. As with Valley View, Paradise's schedule does not indicate which programs are formal educational. In contrast, the programming grid for Paradise proposes an average of 20 hours of formal educational programming per channel per week.[4] Because neither the schedule nor the grid reach the threshold amount at which merit points are awarded, Paradise is entitled to no programming merit points.

Both Sivells Bend's illustrative schedule and programming grid propose an average of 12.25 hours of formal educational programming and 7.75 hours of non-formal ITFS programming per channel per week, for a total of 20 hours per channel per week. Accordingly, Sivells Bend also is ineligible for programming merit points.

E- and F- Channel Group Relocations. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels; therefore, none is entitled to the one point for such applicants.

Total. Valley View, Paradise, and Sivells Bend are each entitled to a total of nine points: four points for being local, three points for being accredited, and two points for observing the four-channel limitation. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service-Third Report and Order in MM Docket No. 83-523, (Third Report and Order)*, 4 F.C.C. Rcd 4830 (1989), *Third Report and Order Reconsidered*, 5 F.C.C. Rcd 945 (1990), and Section 74.913(d) of the Commission's Rules. This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[5] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches fewer than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the three applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. Although Valley View and Sivells Bend included with their enrollment figures letters of intended use from receive sites outside of their jurisdictions, we cannot count the students from those sites because such letters must be filed prior to the "B" cut-off date, which, in this case, is December 30, 1991. Nor can we accept the brief statements from receive sites submitted by Paradise with its original application as complying with our rules for letters of intended use. Those statements failed to provide the elements required by Section 74.932, Note 2,[6] and therefore cannot form the basis for student enrollment figures. Consequently, for each applicant we will count enrolled students only at schools listed as receive sites that are within the applicants' respective jurisdictions.[7] Accordingly, we credit Valley View with 551 students, Sivells Bend with 53 students, and Paradise with 605 students. Because the 53

[3] Valley View's programming grid, which represents that there will be at least some formal educational programming, is sufficient to satisfy the programming requirements of Section 74.931(a).

[4] We find, based on the representations in its programming grid, that Paradise has complied with the programming requirements of Section 74.931(a).

[5] Only receive sites filed as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon.*, 5 F.C.C. Rcd 945 (1990). Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. §74.911(c); *Third Report and Order*, 4 F.C.C. Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. §74.932, Note 2.

[6] Paradise attempted to cure the defects in these receive site statements with its submission in mid-January 1992 of supplemental information from the receive sites regarding their intentions to utilize Paradise's programming. This attempt fails for two reasons. First, the supplemental statements were submitted subsequent to the December 30, 1991 "B" cut-off date, the time when all minor amendments resulting in a comparative advantage must be filed. Second, even if the supplemental information to the receive site letters were timely filed, several elements required of an acceptable letter of intended use would still be absent, such as the types of programming and hours per week of formal and informal programming expected to be used and the site's involvement in the planning, scheduling and production of programming.

[7] Therefore, the allegations made by Sivells Bend in response to the enrollment submissions of Valley View are moot in that they address the validity of receive sites outside of Valley View's school district.

students credited to Sivells Bend are fewer than 80 percent of the total of either Valley View or Paradise, Sivells Bend's application is denied. The applications of Valley View and Paradise are granted, but pursuant to Section 74.913(d), the channels are to be divided evenly between them. Accordingly, Valley View is granted authorization to channels C1 and C2, while Paradise is granted authorization to channels C3 and C4.

OTHER MATTERS

7. Both Valley View and Paradise propose to lease their excess capacity for non-ITFS use, as permitted by Section 74.931. Valley View has submitted a copy of its lease with Ruralvision South, Inc., as has Paradise, with Wise Electric Cooperative, Inc., and both leases conform in all respects with the Commission's requirements. Additionally, there are no petitions to deny the applications of either Valley View or Paradise, and we find these applicants to be fully qualified.

8. Accordingly, IT IS ORDERED, That the application of Valley View Independent School District (BPLIF-910603DI) IS GRANTED for channels C1 and C2, the application of Paradise Independent School District (BPLIF-911008DK) IS GRANTED for channels C3 and C4, and the application of Sivells Bend Independent School District (BPLIF-911008DY) IS DENIED.

9. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

VAN VLECK INDEPENDENT SCHOOL DISTRICT
Chalmers, Texas — File No. BPLIF-910613DG

REGION 3 EDUCATION SERVICE CENTER
Wharton, Texas — File No. BPLIF-911008EL

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1, D2, D3, and D4

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 1992; Released: November 10, 1992

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Van Vleck Independent School District (Van Vleck) and Region 3 Education Service Center (Region 3), each seeking a license in the Instructional Television Fixed Service (ITFS) on channels D1-D4 to serve the Van Vleck, Texas area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Van Vleck and Region 3. Van Vleck is qualified to be an ITFS licensee. It is a governmental organization engaged in the formal education of enrolled students, and it is accredited by the Texas Education Agency. Although Van Vleck proposes to serve students outside its district, because it also proposes to serve schools within its own district, it qualifies as a local applicant.

3. Region 3, a governmental organization engaged in the formal education of enrolled students and accredited by the Texas Education Agency, is also a qualified ITFS applicant.[1] Region 3 proposes to serve schools within its own region, and is therefore a local applicant, even though it, too, proposes to serve students outside its jurisdiction.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

4. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards predetermined merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service-Second Report and Order in MM Docket 83-523* (*Second Report and Order*), 101 F.C.C. 2d 49, 65-72 (1985); 47 C.F.R. §74.913. First, four points are awarded to local applicants.[2] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[3] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

5. Under this comparative selection process, Van Vleck and Region 3 are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant, accredited by the Texas Education Agency, is entitled to three points for accreditation.

Four-Channel Limitation. Neither Van Vleck nor Region 3 is the licensee of, or has filed applications for, additional ITFS channels in the Van Vleck, Texas area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

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[1] The 20 regional educational service centers are public institutions created and authorized by the Texas Legislature and are directly accountable to the Commissioner of Education and the State Board of Education. These centers provide a variety of services to school districts, including direct student instruction and the the development and enhancement of curriculum materials. Accordingly, although participation by schools within the region is voluntary, we find that the regional educational service centers are indeed governmental organizations engaged in the formal education of enrolled students.

[2] A "local" applicant generally is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[3] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

Instructional Programming. Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. Van Vleck's illustrative schedule, as submitted with its application, proposes an average of 24.375 hours of ITFS programming per channel per week. Because the schedule does not indicate which ITFS programs are formal, or those to be delivered to enrolled students for credit, as requested in Question 5, Section IV of the application, we shall consider this programming as non-formal for the purpose of determining merit points. In contrast, Van Vleck's programming grid proposes an average of four hours of formal educational programming per channel per week.[4] Thus, Van Vleck is entitled to no programming merit points.

Region 3's illustrative schedule, as submitted with its application,[5] proposes an average of 5.75 hours of formal educational programming and an average of 27.25 hours of non-formal ITFS programming per channel per week, while its programming grid proposes an average of 9 hours of formal educational programming and 32 hours of non-formal ITFS programming per channel per week. Because neither the schedule nor the grid reach the threshold amount at which merit points are awarded, Region 3 is entitled to no programming merit points.

E- and F- Channel Group Relocation. Neither Van Vleck nor Region 3 is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Van Vleck and Region 3 are each entitled to a total of nine points: four points for being local, three points for being accredited, and two points for observing the four-channel limitation. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

6. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service-Third Report and Order in MM Docket No. 83-523, (Third Report and Order)*, 4 F.C.C. Rcd 4830 (1989), *Third Report and Order Reconsidered*, 5 F.C.C. Rcd 945 (1990), and Section 74.913(d) of the Commission's Rules. This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[6] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this re-

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[4] Van Vleck's programming grid, which represents that there will be at least some formal educational programming, is sufficient to satisfy the programming requirements of Section 74.931(a).

[5] Region 3 submitted an amended schedule on May 7, 1992, adding ditto marks below some of the original schedule's titles, thereby indicating these programs' lengths as one hour instead of 30 minutes, for a total of 41 hours of ITFS programming. However, we cannot consider this clarification amendment, which would qualify Region 3 for one programming merit point, because minor amendments resulting in a comparative advantage must be filed prior to the "B" cut-off date, which was December 30, 1991. *Second Report and Order*, 101 F.C.C. 2d at 74. Yet, in its Opposition to the staff letter informing the applicants of their tie status, Region 3, citing *Alabama Radio Movement, Inc.*, 5 F.C.C. Rcd 2997 (Rev. Bd. 1990), maintains that its schedule amendment merely corrects a clerical error and does not disrupt the comparative process. We disagree. In *Alabama Radio* the applicant was permitted to amend its application to specify a new transmitter site after it established good cause for filing the amendment, a correction which was deemed to have been diligently made and which was found to disadvantage no party in the proceeding. In the case before us, Region 3 not only fails to demonstrate due diligence in amending its schedule, doing so nearly seven months after filing its application, but it now seeks comparative advantage as a result of this amendment. Moreover, Region 3 contends that schedules are for illustrative purposes only and that its intent to transmit 41 hours of ITFS programming should be gleaned from the application as a whole, as in *Rio Grande Broadcasting Co.*, 6 F.C.C. Rcd 5519 (Rev. Bd. 1991). Indeed, in processing ITFS applications, we look to the application as a whole, including both the grid and the schedule, to determine the quantity of programming proposed, and where the two are inconsistent, it is our policy to use the lesser of the two. Accordingly, we are unpersuaded that Region 3's grid can be the sole indicator of its proposed programming. Further, in *Rio Grande*, we looked to that application in its entirety to establish that it in fact contained a proper signature, information that is procedural rather than substantive. In the case before us, the information in question, proposed programming, is substantive; it pertains to a comparative criterion whose quantity can be determined only by reviewing all substantive information included in the application. And even if both the grid and the schedule clearly proposed 41 hours of ITFS programming, Region 3's excess capacity lease, as submitted with the application, provides that the lessee has the right to terminate the agreement if Region 3 transmits more than 40 hours per channel per week. Contrary to Region 3's contention, this provision appears to jeopardize, if not preclude, the possibility of transmitting the proposed schedule. Nor are we able to consider Region 3's amended lease of May 7, 1992, increasing the termination provision to 41 hours, since that amendment also would result in a comparative advantage in that the lease would accommodate more ITFS programming than the original lease.

[6] Only receive sites filed as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon.*, 5 F.C.C. Rcd 945 (1990). Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. §74.911(c); *Third Report and Order*, 4 F.C.C. Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. §74.932, Note 2.

sponse period has expired, the Commission compares the figures to determine if any applicant's system reaches fewer than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the application of the remaining applicant is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because Van Vleck and Region 3 did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.[7]

7. Although both applicants included with their enrollment figures letters of intended use from receive sites outside of their jurisdictions, we cannot include the students from those sites because such letters must be filed prior to the "B" cut-off date, which, in this case, is December 30, 1991. Therefore, for each applicant we will count enrolled students only at schools within the applicants' respective jurisdictions.[8] Accordingly, we credit Van Vleck with 1,052 students, those enrolled at Van Vleck Elementary, Intermediate and Junior and Senior High Schools, and Region 3 with 3,193 students, those enrolled at McAllister Junior High School, Bay City Junior and Senior High Schools, Newgulf Elementary, Iago Junior High School and Boling High School. Because the enrollment figure credited to Van Vleck is less than 80 percent of that for Region 3, the selectee is Region 3.

OTHER MATTERS

8. Region 3 proposes to lease its excess capacity for non-ITFS use, as permitted by Section 74.931. Region 3 has submitted a copy of its lease with United States Wireless Cable, Inc. (U.S. Wireless). Several of that lease's provisions do not comply with the Commission's requirements for excess capacity leases. First, the lease provides for an initial term commencing with the first commercial transmission and continuing through the date five years prior to the expiration of Region 3's license expiration date. Thereafter, the lessee, but not the ITFS licensee, is entitled to extend the agreement for up to five successive terms of five years, constituting, in effect, a term of 30 years. In addition, in the event Region 3 and U.S. Wireless are unable to reach agreement on additional renewals, the lease provides for a six-month continued operation of U.S. Wireless on the licensed channels. These provisions are inconsistent with the Commission's 10-year maximum for excess capacity leases. *Instructional Television Fixed Service in Gen. Dockets 90-54, 80-113- Report and Order*, 5 F.C.C. Rcd 6410, 6416 (1990). Second, although the lease provides for consultation with Region 3 regarding location of the transmission point, another provision gives U.S. Wireless unilateral authority to change this site. We view this as inconsistent with the ITFS licensee's responsibility to ensure the adequacy of its service. *Second Report and Order*, 101 F.C.C. 2d at 90. Finally, the lease affords U.S. Wireless an impermissible amount of control with regard to assignment of the ITFS license in that U.S. Wireless has the right to "secure a qualified entity to which [Region 3] must assign its license" in the event Region 3 is unable to find a potential assignee. Although inconsistent with our requirements for excess capacity leases, these provisions neither reflect on the applicant's basic or comparative qualifications nor preclude grant of an authorization. *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 F.C.C. Rcd 1472, 1473 (1987). Accordingly, Region 3's authorization will be conditioned upon conformity of the lease to Commission requirements. Additionally, there are no petitions to deny Region 3's application, and we find Region 3 to be fully qualified.

9. Accordingly, IT IS ORDERED, That the application of the Region 3 Education Service Center (BPLIF-911008EL) IS GRANTED, subject to the condition that within 30 days from the date of this Order, Region 3 Education Service Center submits to the Chief, Mass Media Bureau for approval information demonstrating compliance with Commission requirements, including, if appropriate, an amended excess capacity lease conforming to the requirements discussed herein. The application of the Van Vleck Independent School District (BPLIF-910613DG) IS DENIED.

10. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[7] The staff sent letters informing Van Vleck and Region 3 of their tie status on March 13, 1992. While Region 3's enrollment figures were timely filed, by April 13, 1992, Van Vleck filed a motion for extension of time on April 15, 1992, requesting an additional week because individuals responsible for preparing Van Vleck's enrollment statement were unavailable. Region 3 filed an Opposition to the motion, relying on *Hispanic Information and Telecommunications Network, Inc. (HITN)*, 60 R.R. 2d 1341 (1986), and contends primarily that Van Vleck obtained an unfair advantage by requesting an extension after it was in receipt of Region 3's timely filed enrollment figures. In *HITN*, however, the nonlocal applicant's request for an extension to substitute a local applicant was denied because it had failed to negotiate a receive site agreement prior to filing its application, a prerequisite to filing such a substitution. Here, there is no equally compelling substantive reason for denying Van Vleck a one-week extension. As for Region 3's allegation of unfair advantage, it is clear that enrollment figures submitted by an applicant should not fluctuate based upon the submission of a competing applicant. Indeed, such figures are actually established as of the "B" cut-off date, when all receive sites must be listed and letters of intended use incorporated in the application. Moreover, we believe that the additional week involved here neither seriously undermines the orderly disposition of this proceeding nor prejudices the rights of Region 3. *Voice of Reason, Inc.*, 40 F.C.C. 2d 1121, 1122 (1973). However, our determination here is based upon the circumstances of this particular case and should not be construed as detracting from our procedural requirements designed to promote the public interest by requiring the filing of timely pleadings. *Id.*

[8] Consequently, the allegations made by the applicants in response to the enrollment submissions are moot in that they address the validity of receive sites outside their respective jurisdictions.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-238

In the Matter of

Amendment of Section 73.202(b), RM-8086
Table of Allotments,
FM Broadcast Stations.
(Amarillo, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1992; Released: November 10, 1992

Comment Date: January 4, 1993
Reply Comment Date: January 19, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by KAEZ-FM, Inc. ("petitioner"), permittee of Station KAEZ-FM, Channel 289A, Amarillo, Texas, requesting the substitution of Channel 289C3 for Channel 289A at Amarillo, and modification of Station KAEZ-FM's construction permit to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 289C3 for Channel 289A at Amarillo, Texas, since it could provide the community with an additional wide coverage area FM service. Channel 289C3 can be allotted to Amarillo in compliance with the Commission's minimum distance separation requirements and can be used at Station KAEZ-FM's licensed site.[1] As requested, we also propose to modify petitioner's authorization for Station KAEZ-FM to specify operation on Channel 289C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 289C3 at Amarillo or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Amarillo, Texas	226C1, 231C 245C1, 250C, 254C1, 259A, 265C1, 270C1, 275C1, 276A, 289A	226C1, 231C 245C1, 250C, 254C1, 259A, 265C1, 270C1, 275C1, 276A, 289C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 4, 1993** and reply comments on or before **January 19, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Eric S. Kravetz, Esq.
Brown Nietert & Kaufman, Chartered
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

[1] The coordinates for Channel 289C3 at Amarillo are North Latitude 35-12-28 and West Longitude 101-51-18.

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-244

In the Matter of

Amendment of Section 73.202(b) RM-8027
Table of Allotments,
FM Broadcast Stations.
(Charlotte Amalie, Virgin Islands)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 1, 1992; Released: November 10, 1992

Comment Date: January 4, 1993
Reply Comment Date: January 19, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Robert E. Miller, Jonathan Cohen and Arthur V. Belendiuk, d/b/a Calypso Communications ("petitioner"), permittee of Station WVNX(FM), proposing the substitution of Channel 267B for Channel 246B at Charlotte Amalie, Virgin Islands, and the modification of Station WVNX(FM)'s construction permit to specify operation on Channel 267B. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner states that the use of Channel 246B at Charlotte Amalie would create a harmful electrical interference problem with Channel 247, Tortola, British Virgin Islands, which is 20 miles from Charlotte Amalie. Petitioner claims that this problem can be eliminated if Station WVNX(FM) operates on another frequency. Petitioner further claims that Channel 267B would be an acceptable substitution that satisfies the Commission's spacing requirements.

3. We believe the public interest would be served by proposing the substitution of Channel 267B for Channel 246B, since it could eliminate any possible interference with Channel 247 in Tortola. Our engineering analysis indicates Channel 267B can be allotted to Charlotte Amalie in compliance with the Commission's minimum distance separation requirements at petitioner's present construction site with a site restriction of 20.8 kilometers (12.9 miles) east.[1] As requested, we also propose to modify Station WVNX(FM)'s construction permit to specify operation on Channel 267B.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Charlotte Amalie, Virgin Islands	241B1, 246B, 250B, 271B, 282B, 287B	241B1, 250B, 267B, 271B, 282B, 287B

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 4, 1993,** and reply comments on or before **January 19, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Arthur V. Belendiuk, Esq.
Smithwick and Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 267B at Charlotte Amalie are North Latitude 18-20-30 and West Longitude 64-43-59.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-156

In the Matter of

Amendment of Section 73.202(b), RM-8021
Table of Allotments,
FM Broadcast Stations.
(Knob Noster, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 5, 1992; Released: November 10, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 4643 (1992), proposing the substitution of Channel 289C2 for Channel 289C3 at Knob Noster, Missouri, and modification of the construction permit (BPH-911004IE) for Station KXKX(FM) accordingly. The *Notice* was issued in response to a petition filed by Bick Broadcasting Company ("petitioner"). Petitioner filed comments restating its interest in the allotment of Channel 289C2 at Knob Noster.[1]

2. We believe the public interest would be served by substituting Channel 289C2 for Channel 289C3 at Knob Noster, Missouri, in order to provide the area with additional reception service. As indicated in the *Notice*, Channel 289C2 can be allotted to Knob Noster consistent with the Commission's spacing requirements at petitioner's specified site.[2] We will authorize a modification of petitioner's construction permit for station KXKX(FM), Channel 289C3, to specify operation on Channel 289C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 28, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Knob Noster, Missouri	289C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KXKX(FM), Channel 289C3, Knob Noster, Missouri, IS MODIFIED to specify operation on Channel 289C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Bick Broadcasting Company, permittee of Station KXKX(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In response to the *Notice*, petitioner provided an affidavit verifying the statements in its petition for rule making.
[2] The coordinates for Channel 289C2 at Knob Noster are 38-46-28 and 93-37-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-243

In the Matter of

Amendment of Section 73.606(b) RM-7700
Table of Allotments,
TV Broadcast Stations.
(Frederiksted, Virgin Islands)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 1, 1992; Released: November 10, 1992

Comment Date: January 4, 1993.
Reply Comment Date: January 19, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Luis E. Rosa ("petitioner"), proposing the allotment of UHF Channel 66 to Frederiksted, Virgin Islands, as the community's first local television broadcast service. Petitioner states his intention to apply for the channel, if allotted.

2. In support of his proposal, petitioner states that Frederiksted (population 4,066)[1] is located on the island of St. Croix, one of two population centers on the island. St. Croix, the largest island in the Virgin Islands, has a population of 50,139.

3. A staff engineering analysis has determined that television Channel 66 can be allotted to Frederiksted in compliance with the Commission's miniumum distance separation requirements.[2] Although the Commission has imposed a freeze on television allotments in certain areas, Frederiksted is not in one of the affected areas.[3]

4. Accordingly, we seek comments on the proposed amendment of the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Frederiksted, Virgin Islands	--	66

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 4, 1993,** and reply comments on or before **January 19, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James L. Oyster, Esq.
Route 1, Box 203A
Castleton, Virginia 22716
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the Television Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Population figures taken from 1990 U.S. Census.
[2] The coordinates for Channel 66 at Frederiksted are North Latitude 17-42-48 and West Longitude 64-53-00.
[3] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, July 29, 1987.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture	**CC Docket No. 89-79**
Filing and Review of Open Network Architecture Plans	**CC Docket No. 88-2**

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: October 22, 1992; Released: October 26, 1992

By the Chief, Common Carrier Bureau:

1. In the *Part 69/ONA Order*, the Commission required the Bell Operating Companies (BOCs) to file federal tariffs for the basic service elements (BSEs) listed in their amended Open Network Architecture (ONA) plans.[1] While the BOCs filed tariffs for many ONA services, they also filed petitions for waivers, seeking to refrain from tariffing a number of ONA services. On January 31, 1992, in the *ONA BSE Withdrawal Order*, we granted some of the requests included in those waivers, while denying others.[2] In this order we address petitions concerning ONA services that we did not address in the *ONA BSE Withdrawal Order* as well as petitions seeking reconsideration of the decisions we reached in that order. Nevada Bell, NYNEX, Pacific Bell, and Southwestern Bell filed supplementary petitions for waiver, while Bell Atlantic and MCI filed petitions for partial reconsideration of the *ONA BSE Withdrawal Order*. For the reasons discussed herein, we grant the petition filed by MCI and the petitions for temporary waivers filed by NYNEX, Pacific Bell and Southwestern Bell. We grant in part and deny in part the waiver petition of Nevada Bell, and deny the petition filed by Bell Atlantic.

Bell Atlantic

2. Bell Atlantic petitions for reconsideration of our decision in the *ONA BSE Withdrawal Order* to deny Bell Atlantic's request to refrain from tariffing two ONA services.[3] We decline to alter that decision. In our earlier order, we denied Bell Atlantic's request for a waiver for Direct Inward Dialing (DID) (CALLED DIRECTORY NUMBER DELIVERY VIA DID) and DID Trunk Queuing.[4] Bell Atlantic argued that it is unable to measure usage of the services. Bell Atlantic now states that these DID services are identical to those DID services for which we granted NYNEX's waiver request. Bell Atlantic claims that our finding that neither NYNEX service has utility in an interstate environment was not limited to any unique configuration of NYNEX's service, "but on its face, governed all waiver requests for similar services." MCI opposes Bell Atlantic's request, arguing that the Bureau was wrong to grant NYNEX's waiver with respect to its DID services, given that BellSouth and US West are able to offer DID services.[5]

3. Bell Atlantic misunderstands our decision with respect to NYNEX's direct inward dialing services. We granted NYNEX's request because we accepted NYNEX's claim that its equipment was not capable of outpulsing the number of digits necessary to provide the specific direct inward dialing services in NYNEX's ONA plan in an interstate environment.[6] Bell Atlantic did not and does not assert that its equipment cannot provide the direct inward dialing services that it committed to offer in its ONA plans.

4. If the limitations of Bell Atlantic's equipment prevent it from providing DID and DID Trunk Queuing services in an interstate environment, it must state those facts in a waiver request. In its petition for reconsideration, however, Bell Atlantic merely asserts that since NYNEX is unable to offer the DID services it proposed on an interstate basis, Bell Atlantic should not be required to offer the identical DID services that it initially proposed. Bell Atlantic has the burden of proof in this situation and it has not satisfied that burden.

NYNEX

5. MCI petitions for reconsideration of the decision to grant NYNEX's ONA waiver petition to withdraw its Direct Inward Dialing (DID) (CALLED DIRECTORY NUMBER DELIVERY VIA DID) and DNIS on 800 (DIALED NUMBER IDENTIFICATION VIA INWATS TO DID) services.[7] We grant MCI's petition, but also grant NYNEX a temporary waiver, as indicated below. MCI states that NYNEX's inclusion of the two services in its ONA plan

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[1] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order*); Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order*), *Erratum*, 5 FCC Rcd at 4045, *pets. for recon. pending, pets. for rev. pending*, California v. FCC, (9th Cir. No. 90-70336, filed July 5, 1990); 6 FCC Rcd 7646 (1991) (*ONA Further Amendments Order*) *pet. for review pending*, MCI Telecommunications Corp. v. FCC and USA (9th Cir. No. 92-70189, filed Feb. 19, 1992).

[2] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, CC Docket Nos. 89-79 and 88-2, 7 FCC Rcd 811 (1992) (*ONA BSE Withdrawal Order*).

[3] Bell Atlantic Pet., Feb. 21, 1992, at 2.

[4] The format we use for identifying BSEs is to use the name employed by the particular BOC followed -- in parentheses and capital letters -- by the generic name of the service (from the ONA Services Users Guide) if the name is different from the name employed by the BOC.

[5] MCI Opp., Mar. 17, 1992.

[6] In fact, as we discuss, *infra*, NYNEX has now altered its position and committed to offer both of the direct inward dialing services that it initially sought to refrain from tariffing.

[7] MCI Pet., Mar. 2, 1992.

indicates that NYNEX judged the services to be technically feasible. MCI argues that if BellSouth and US West plan to offer the services and we have refused to grant waivers to Bell Atlantic and Pacific Bell with respect to the services, there is no reason to treat NYNEX differently. NYNEX responds that there is good reason to distinguish it from the other four BOCs, and that it provided detailed justification in its initial waiver petition.[8] MCI answers that NYNEX cannot deny the feasibility of the services now, after indicating that they were feasible by including them in its ONA plans.[9]

6. In its comments, AT&T also provides additional information about the technical aspects of providing the DID and DNIS on 800 services that NYNEX proposed. Our decision to grant NYNEX a waiver for the DID and DNIS on 800 services was based on two premises: 1) that NYNEX's switches could not outpulse more than seven digits to a direct inward dialing customer; and 2) that seven-digit outpulsing was inadequate to permit either the DID or DNIS on 800 services to have utility in an interstate environment. AT&T explains that while NYNEX's switches and network might not currently be configured to handle ten-digit DID outpulsing, the type of switches NYNEX uses are capable of outpulsing ten or more digits.[10] Furthermore, AT&T argues that both of NYNEX's DID and DNIS on 800 services are technologically feasible as interstate services, even with only a seven-digit outpulsing capability.

7. On July 15, 1992, NYNEX altered its position and committed to tariff both DID and DNIS on 800.[11] NYNEX asks, however, that it be permitted six months to develop methods, procedures, costs, pricing, and billing capabilities for the services.[12] Thus, NYNEX asks to be allowed to delay tariffing the services until February 1, 1993. As we originally granted NYNEX a waiver for these services, we grant it time to adjust to this change. We modify NYNEX's waiver to permit it to refrain from tariffing these services until February 1, 1993.

8. In addition, NYNEX requests a temporary waiver to delay tariffing two services for which it was denied a waiver in the *ONA BSE Withdrawal Order*.[13] We grant NYNEX a temporary waiver for both services. NYNEX asks that we permit it to refrain from tariffing Trunk Group Make Busy (MAKE BUSY KEY) until December 1, 1992, to enable NYNEX to work with its switch manufacturers to develop, provision, order, bill, and maintain the service for interstate use and to file any Part 69 waivers, *e.g.*, for new basic serving arrangements (BSAs), that it believes to be necessary in connection with tariffing the service. In the absence of any opposing comments, we grant NYNEX the additional time it requests.[14]

Pacific & Nevada

Pacific

9. Pacific requests a waiver to refrain temporarily from tariffing four services, including three for which we denied waivers in the *ONA BSE Withdrawal Order*. We grant a temporary waiver for all four.[15] Pacific first asks to withhold Caller ID and Bulk Caller Line ID (CALLING DIRECTORY NUMBER DELIVERY VIA ICLID and BCLID) temporarily, until at least December 31, 1992. Pacific notes that we granted a waiver to Bell Atlantic, permitting Bell Atlantic to refrain from tariffing its caller ID services until its deployment of Signaling System 7 (SS7) makes it practical to offer the services. Pacific requests a similar waiver due to incomplete deployment of SS7 technology in its network at this time. Pacific expects that deployment to be substantially complete by the end of 1992.

10. Pacific further requests that we extend its waiver beyond the end of 1992 due to potential conflict with California state regulations. In our earlier decision, we rejected Pacific's argument that it needed to withdraw the services to avoid possible conflict with *Caller ID* regulatory proceedings pending at the Commission and in California. Pacific now states that the California PUC has agreed to permit Pacific to offer caller ID on an intrastate basis, but has conditioned that offering on terms that Pacific opposed and that may lead Pacific to refrain from offering intrastate caller ID.[16] AT&T objects to Pacific's request to extend the waiver beyond the end of 1992, asserting that California state proceedings should not be permitted to delay the availability of interstate offerings.[17] Pacific responds that it is not technically practical for it to offer the service on an interstate basis while preventing the service from being used on an intrastate basis. Therefore, Pacific asks us either to permit it to refrain from offering the service on an interstate basis, or, preferably, preempt California's regulation of this service given that such regulation would interfere with its provision of the service on an interstate basis. Pacific has filed comments to this effect in the Commission's *Caller ID* proceeding.[18]

11. We grant Pacific's waiver request concerning these two caller ID services to the extent of permitting Pacific to refrain from tariffing these services until December 31, 1992 to permit Pacific to complete its deployment of SS7.

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[8] NYNEX Opp., Mar. 24, 1992.

[9] MCI Opp. Apr. 3, 1992.

[10] Letter from Karen E. Weis, AT&T, to Donna Searcy, filed Mar. 4, 1992.

[11] Letter from Shelley E. Harms, NYNEX, to Donna Searcy, filed July 15, 1992. We note that NYNEX will not be tariffing DNIS on 800 in the precise form that is described in its ONA plan, because it is technically impractical for it to transmit the dialed 800 number in the interstate environment. Instead, NYNEX will transmit a translated POTS (plain old telephone service) telephone number as part of this service. We find this to be an acceptable version of the service.

[12] Letter from Shelley E. Harms, NYNEX, to Donna Searcy, filed July 15, 1992.

[13] NYNEX Pet., Feb. 7, 1992.

[14] With respect to Pulsenet (VERIFY INTEGRITY OF SUBSCRIBER LINES), NYNEX filed a tariff that became effective September 15, 1992, and seeks a temporary waiver to permit this delay. In the absence of opposition, we grant this temporary waiver.

[15] Pacific Pet., Feb. 20, 1992. Pacific also filed an Application for Review on March 2, 1992. That application will be decided separately, by the Commission.

[16] Letter from Celia Nogales, Pacific Telesis, to Donna Searcy, filed July 30, 1992.

[17] AT&T Opp., Mar. 17, 1992.

[18] Rules and Policies Regarding Calling Number Identification Service, Notice of Proposed Rulemaking, CC Docket 91-281, 6 FCC Rcd 6752 (1991).

We will not, however, grant a waiver beyond that date prior to our decision in the *Caller ID* proceeding, where we will address the issue of preemption. Pacific also makes an unopposed request to forgo tariffing Selective Call Acceptance until the deployment of SS7 is substantially complete, at the end of 1992, and we grant this request for a temporary waiver until December 31, 1992.[19]

Nevada

12. Nevada Bell seeks a waiver to refrain from tariffing seventeen services,[20] and we grant sixteen of its requests, although we grant four on only a temporary basis.

13. Nevada begins by explaining that it neither offers nor is technically capable of offering packet switching access service on either an interstate or intrastate basis. Furthermore, it observes that the Pacific ONA plan specifically stated that Nevada Bell did not intend to offer BSEs related to packet switched services. Therefore, Nevada asks to be permitted to refrain from filing five packet switching services listed in Pacific's plan: Call Redirection, Closed User Group, Fast Select Acceptance, Fast Select Request Hunt Group, and Reverse Charge Acceptance. MCI supports these requests,[21] and we grant them.

14. Nevada also asks to refrain from tariffing the Network Reconfiguration service listed in the Pacific ONA plan because that BSE requires customer access to a digital cross-connect system, and Nevada does not have such a system as part of its network architecture. Nevada estimates that the installation of a digital cross-connect system would cost, at a minimum, $250,000 per 1000 circuits. MCI states that it does not oppose this request,[22] and we grant it.

15. Nevada asserts that its switches are not capable of providing Answer Supervision with Lineside Interface without an expensive software upgrade, and in its initial request asks for permission to withdraw this service given the lack of demand.[23] MCI opposes this initial request, arguing that a current lack of demand is no justification for not offering a service that a BOC committed to offer in its plan.[24] Nevada responds by modifying its request to seek a temporary waiver to delay the tariffing of this service until November 1, 1992. We find this request to be reasonable, and we grant Nevada this temporary delay.

16. Nevada also argues that its network switches are incapable of providing DID Trunk Queuing.[25] It contends that its digital No. 5ESS switches cannot provide the service without the installation of a generic upgrade that is not currently available. It asks that it be permitted to withhold this service until the generic upgrade is available. MCI opposes this request, arguing that the Commission has required other BOCs to federally tariff this service, and Nevada has not distinguished itself from these other BOCs.[26] Nevada responds that it has distinguished itself from those who can offer DID Trunk Queuing.[27] Nevada submits the relevant pages of the Bell Operating Companies ONA Services User Guide and Bell Atlantic and Pacific Bell tariffs indicating that DID Trunk Queuing is only available in No. 1AESS end offices, and states that Nevada has no No. 1AESS switching facilities in its network. We find Nevada's position to be reasonable, and we grant Nevada a temporary delay for this service, until a generic upgrade for 5ESS switches becomes available.

17. Nevada also seeks to refrain from tariffing Automatic Protection Switching and Secondary Channel Capability. Nevada claims that it does not serve the sophisticated customers that might demand this type of special access in its market. MCI challenges this reasoning, arguing that a lack of demand is no excuse.[28] Nevada responds that while these services were listed in the Pacific ONA plans, Pacific only intended to offer them in Pacific Bell markets, where they are currently tariffed.[29] Nevada states that it is currently incapable of providing the two services on either an interstate or intrastate basis, and it asks that it not be required to make the expenditures necessary to be able to provide them. In light of the fact that these services are included in Pacific Bell's interstate tariffs, we will treat that tariff as satisfying the commitment made in Pacific's ONA plan and grant Nevada's waiver request with respect to these services.

18. Nevada also requests a waiver to refrain from tariffing three services that require the deployment of SS7 technology: Calling Directory Number Delivery (CDND) via BCLID, CDND via ICLID, and Selective Call Acceptance. Nevada states that it has not completed the deployment of SS7, although it does expect to do so in 1992, and that lineside interconnection standards have not yet been established. It also claims that CDND via BCLID can only be offered from a 1AESS switch, and that its network does not include any of these switches.[30] Finally, Nevada argues that both the Nevada Public Service Commission and the FCC are still considering privacy and other policy issues relating to caller ID services, and that Nevada Bell should not be required to tariff caller ID services while those proceedings are still pending.[31] MCI supports the grant of a waiver for these services, but only until SS7 deployment is adequate.[32]

19. As Nevada lacks any 1AESS switches and CDND via BCLID can only be offered from a 1AESS switch, we grant Nevada's request to refrain from tariffing CDND via BCLID. In addition, we grant Nevada a temporary waiver with respect to CDND via ICLID and Selective Call Acceptance to permit Nevada to refrain from tariffing these

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[19] In addition, Pacific has already tariffed DID Trunk Queuing, for which it requested a temporary waiver. We grant Pacific's request.

[20] Nevada Supp. Pet., Dec. 24, 1991, modified by Nevada Reply, Feb. 7, 1992 and Nevada Pet., Jun.2 , 1992.

[21] MCI Comments, Jan . 28, 1992, at 5.

[22] Id. at 6 n.14.

[23] Nevada Supp. Pet. Dec. 24, 1991, at 24-25.

[24] MCI Comments, Jan.28, 1992, at 6 n.14.

[25] Nevada Pet., Jun.2, 1992.

[26] MCI Opp., Jun.24, 1992, at 2.

[27] Nevada Reply, July 6, 1992.

[28] MCI Opp., Jan. 28, at 6.

[29] Nevada Reply, Feb. 7, 1992, at 7. Pacific's 1989 Amended ONA Plans, which were approved by the Commission, indicated that Pacific projected a 100% deployment of both services in the Nevada territory. Pacific Amended ONA Plans, May 1989, appendix EE at 1. Nevada claims, however, that these figures were in error and that the error was corrected in Pacific's May 1992 ONA filing. *See also*, Letter from Betsy S. Granger, Pacific Bell, to Donna Searcy, filed August 7, 1992, explaining typographical errors in Pacific's filings.

[30] Nevada Supp. Pet., Dec. 24, 1991, at 20.

[31] Nevada Supp. Pet., Dec. 24, 1991, at 28-29.

[32] MCI Opp., Jan.28, 1992, at 6 n.14.

services until its deployment of SS7 makes it practical to offer them. As we explained in the initial *ONA BSE Withdrawal Order*, state regulations should not prevent Pacific from tariffing an interstate service.[33]

20. Nevada asks to withhold three additional services from its federal tariffs that are currently included in its intrastate tariffs: Message Desk (SMDI), Message Waiting Indicator Activation (Visual), Message Waiting Indicator Activation (Audible). Nevada asserts that there is no interstate demand for these services and that it has only one intrastate customer for two of the services.[34] It estimates that the cost of modifying its switching facilities to accommodate potential customers could be as much as $25,000 per port, although it admits that the cost could also be less than $10,000 per port under optimal conditions.[35]

21. As we stated in the *ONA BSE Withdrawal Order*, Nevada faces a high hurdle to gain a waiver based on a lack of demand.[36] In this case, as Nevada has actually offered these services in its intrastate tariffs and there has only been demand from one customer, we permit Nevada to withhold the services from its interstate tariffs for the moment. We require, however, that if a potential customer makes a request for one of these services, for example, through the 120-day ONA request process, Nevada must provide that service to the customer within six months of the customer's request.

22. Finally, we address Nevada's request to refrain from tariffing Called Directory Number Delivery via DID.[37] Nevada makes the same argument as Bell Atlantic, asserting that "there is no basis for treating Nevada Bell's request differently" from NYNEX's request for a waiver with respect to this service. As we explained above, however, we have reversed our decision on NYNEX's DID services. Moreover, Nevada has the burden of convincing us that it is incapable of providing a service that it committed to offer in its approved ONA plan and that a number of other BOCs are willing to offer. Because Nevada has not done so, we deny its request to refrain from tariffing this service.

Southwestern Bell

23. Southwestern Bell requests a waiver to refrain from tariffing Loop Status Verification Service (also referred to as Detection of Break in Line Within 60 Seconds by Southwestern and generically as VERIFY INTEGRITY OF SUBSCRIBER LINES) and Traffic Data Accessible by ESP (TRAFFIC DATA REPORTS).[38] With respect to the Traffic Data Reports BSE, Southwestern argues that customers are dissatisfied with the intrastate version of the service, and states that it plans to introduce Customer Network Administration, a superior form of the service, by early 1993. In the absence of any opposition to this request, we grant Southwestern Bell a temporary waiver for this service until March 31, 1993. At that time, Southwestern Bell must tariff either Traffic Data Reports or Customer Network Administration.

24. Southwestern argues that it should be permitted to refrain from tariffing the Verify Integrity of Subscriber Lines BSE, because it has lost its equipment vendor. The Alarm Industry Communications Committee (AICC).[39] challenges this argument, asserting that Southwestern has not identified the vendor that it lost nor explained why it cannot deal with a different vendor. Southwestern responds by naming its initial vendor and asserting that it could not locate a vendor that produced the same type of equipment as that vendor. It observes that the two vendors suggested by the AICC use derived local channel (DLC) technology which is different from the technology used by Southwestern's original vendor.

25. Southwestern also observes that national standards are now being discussed for loop break detection, and argues that it would be more efficient and effective for Southwestern to defer further development of this service until after an industry standard emerges. The AICC disagrees, charging that alarm industry members want regionally based services in the interim. Southwestern questions that assertion, asserting that it has not received any requests for loop break detection services nor has its market research indicated any such demand or willingness to pay for such services in the near term.

26. Finally, Southwestern argues that it has been developing stand-alone Data Over Voice (DOV) service as a substitute service. The AICC argues that DOV service has been under development since 1990, and that Southwestern offers virtually no assurance to the alarm industry that it will be implemented within the foreseeable future. In response, Southwestern filed a federal tariff for the stand-alone DOV service in July 1992, which became effective on September 15, 1992.[40] While DOV service does not fully satisfy the desires of the AICC, on September 4, 1992, Southwestern also filed a letter committing to work quickly with the alarm industry to try to satisfy the specific demands of AICC members in its region.[41] Based on this additional commitment by Southwestern, the AICC has withdrawn its opposition to the Southwestern waiver request.[42] Therefore, we grant Southwestern Bell a waiver to refrain from offering Verify Integrity of Subscriber Lines, contingent upon Southwestern fulfilling the commitment it has made to the AICC in its September 4, 1992 letter.

ORDERING CLAUSES

27. IT IS ORDERED that Bell Atlantic's petition for partial reconsideration of the *ONA BSE Withdrawal Order* IS DENIED.

28. IT IS FURTHER ORDERED that MCI's petition for partial reconsideration of the *ONA BSE Withdrawal Order* IS GRANTED.

29. IT IS FURTHER ORDERED that Nevada's petitions for waiver of the Commission's ONA Tariff Order ARE GRANTED IN PART, with respect to Answer Supervision

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[33] *ONA BSE Withdrawal Order*, 7 FCC Rcd at 816.
[34] Nevada Supp. Pet., Dec. 24, 1991, at 17-18.
[35] Id. at 18.
[36] *ONA BSE Withdrawal Order*, 7 FCC Rcd at 811 para. 2.
[37] Nevada Supp. Pet., Dec. 24, 1991, at 22-24; Reply, Feb. 7, 1992, at 6.
[38] Southwestern Pet., Jun. 11, 1992.
[39] AICC Opp., Jun. 30, 1992.
[40] Southwestern Bell, Transmittal 2211, July 17, 1992.
[41] Letter from Mike Zpevak, Southwestern Bell, to Donna Searcy, FCC, Sept. 4, 1992.
[42] Letter from Gerard Duffy, AICC, to Donna Searcy, FCC, Sept. 8, 1992.

with Lineside Interface, Automatic Protection Switching, Call Redirection, Calling Directory Number Delivery (CDND) via BCLID, CDND via ICLID, Closed User Group, DID Trunk Queuing, Fast Select Acceptance, Fast Select Request Hunt Group, Message Desk (SMDI), Message Waiting Indicator Activation (Visual), Message Waiting Indicator Activation (Audible), Network Reconfiguration, Reverse Charge Acceptance, Secondary Channel Capacity, and Selective Call Acceptance, and DENIED IN PART, with respect to CDND via DID.

30. IT IS FURTHER ORDERED that NYNEX's petition for waiver of the Commission's ONA Tariff Order IS GRANTED and its request to refrain from tariffing DID and DNIS on 800 services until February 1, 1993 IS GRANTED.

31. IT IS FURTHER ORDERED that Pacific Bell's petition for waiver of the Commission's ONA Tariff Order IS GRANTED.

32. IT IS FURTHER ORDERED that Southwestern Bell's petition for waiver of the Commission's ONA Tariff Order IS GRANTED.

33. IT IS FURTHER ORDERED that Bell Atlantic and Nevada SHALL (FILE, within 30 days of the release date of this Order, tariff revisions to become effective on not less than 15 days' notice that are consistent with this Order. For these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 92-671.

34. IT IS FURTHER ORDERED that Nevada, NYNEX, Pacific Bell, and Southwestern Bell SHALL FILE, within 30 days of the termination of their temporary waivers, tariff revisions to become effective on not less than 15 days' notice that are consistent with this Order. For these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 92-672.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 28, 1992

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS FILES PETITION TO AMEND FCC ARMIS USOA REPORT (FCC REPORT 43-02)

PUBLIC COMMENT INVITED

The National Association of Regulatory Utility Commissioners' (NARUC) files a petition for the Commission to amend its ARMIS reports to include, on a study area basis, the cost amounts included in the Class A level accounts that have been prorated to or from each account. NARUC, in its petition dated April 29, 1992, states that this should be accomplished by providing the information in detail sufficient to reflect the beginning book balances and the prorated cost amounts, and the filing should also include a description of the allocation methods and factors used for the accounts, to allow both the Federal and state regulators to more efficiently and effectively monitor these costs.

Parties may file comments on NARUC's petition no later than **November 10, 1992.** Replies should be filed by **November 23, 1992.** Comments should reference AAD 92-87. A copy of each pleading should be sent to Virginia Brockington, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to Downtown Copy Center (DCC), 1990 M Street, N.W., Suite 640, Washington, D.C. 20036, (202) 452-1422. A copy of NARUC's petition is available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Virginia Brockington, (202) 634-1861.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

UNITED STATES SATELLITE BROADCASTING COMPANY, INC.	File Nos. DBS-81-07/84-07/88-06MP DBS-81-07/88-06MP/MINOR DBS-91-01MP/MINOR/EXT.

For Modification of Construction
Permit for Direct Broadcast
Satellite System and
For Extension of Time to Construct
Direct Broadcast Satellite System

and

HUGHES COMMUNICATIONS GALAXY, INC.	File Nos. DBS-84-02/88-07MP DBS-84-02/88-07MP/EXT. DBS-91-02MP/MINOR

For Modification of Construction
Permit for Direct Broadcast
Satellite System

MEMORANDUM OPINION AND ORDER

Adopted: October 21, 1992; Released: October 22, 1992

By the Chief, Video Services Division, Mass Media Bureau:

1. Hughes Communications Galaxy, Inc. ("Hughes"), is currently authorized to construct a Direct Broadcast Satellite ("DBS") system consisting of three satellites. Two satellites are to be located at orbital position 101^{0}W and are to provide 27 channels of eastern half-CONUS[1] or full-CONUS[2] DBS service on channels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 26, 28, 30 and 32. The third satellite is to be located at orbital position 157^{0}W and is to provide 27 channels of western half-CONUS DBS service on channels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 26, 28, 30 and 32. *Advanced Communications Corporation*, 6 FCC Rcd 2269, 2270, 2274 (1991) ("*Advanced* "). Pursuant to Section 100.19(b) of the Commission's Rules, 47 C.F.R. §100.19(b), Hughes' DBS system is required to be in operation by December 7, 1994. *Id.* at 2274.

2. United States Satellite Broadcasting Company, Inc. ("USSB"), is authorized to construct a three-satellite DBS system. One satellite is to be located at orbital position 101^{0}W and is to provide five channels of eastern half-CONUS or full-CONUS DBS service on channels 23, 25, 27, 29 and 31. A second satellite is to be located at orbital position 110^{0}W and is to provide three channels of eastern half-CONUS or full-CONUS DBS service on channels 28, 30 and 32. The third satellite is to be located at orbital position 148^{0}W and is to provide eight channels of western half-CONUS DBS service on channels 18, 20, 22, 24, 26, 28, 30 and 32. *United States Satellite Broadcasting Company, Inc.*, 5 FCC Rcd 7576, 7577 (1990) ("*USSB/Channels*"). Pursuant to Section 100.19(b) of the Commission's Rules, USSB's DBS system is required to be in operation by December 4, 1992. *United States Satellite Broadcasting Company, Inc.*, 3 FCC Rcd 6858, 6859-60, 6861 (1988) ("*USSB/Service*").

3. Now under consideration are: (i) an "Application for Minor Modification of Construction Permit and Technical Showing Regarding Compliance with International Requirements" filed by Hughes on July 15, 1991; (ii) an "Application for Minor Modification of Construction Permit" filed by USSB on July 15, 1991; (iii) a "Joint Request for Authorization of a Mutual Exchange of Channel Assignments at 101^{0}W", filed by Hughes and USSB on July 15, 1991; (iv) an "Application for Additional Time to Construct and Launch Direct Broadcast Satellites" filed by USSB on July 15, 1991; and (v) related submissions.

4. *Hughes' Minor Modification Application and Technical Showing.* Hughes' authorization to construct and operate a three-satellite DBS system, and the assignment to Hughes of orbital positions and channels, was conditioned upon the submission by Hughes of updated technical information necessary to demonstrate compliance with international treaties and agreements. *Advanced*, 6 FCC Rcd at 2272-23. In its minor modification application/technical compliance showing, Hughes seeks: (a) authorization to utilize dual-mode 120/240 watt transponders in its satellites at 101^{0}W and 110^{0}W, and to make changes in the antenna design and technical configuration of those satellites; and (b) authorization to utilize dual-mode 60/120 watt transponders in its satellite at 157^{0}W and to make changes in the antenna design and technical configuration of that satellite. Hughes also submits technical information and data to demonstrate that its system, as modified, will comply with international treaties and agreements.

5. In support of its modification request, Hughes states that the proposed modifications will incorporate the latest developments in satellite technology and allow flexibility for future needs. Specifically, Hughes states that its proposed system, as modified, would be able to utilize digital transmission technology in its satellites at 101^{0}W, thus giving the system the flexibility to incorporate digital video compression, which allows the transmission of multiple video signals through one DBS channel. This would result

[1] Signals from DBS satellites which cover half of the continental United States are referred to as "half-CONUS" signals; those which cover the entire continental United States are referred to as "full-CONUS" signals.

[2] Four of the DBS orbital positions assigned to the United States under international treaties and agreements, 61.5^{0}W, 101^{0}W, 110^{0}W and 119^{0}W, may be technically suitable for delivering full-CONUS DBS service. The Commission conditionally authorized full-CONUS signals from these orbital positions pending final confirmation of their compliance with the United States' obligations under international treaties and agreements. *Continental Satellite Corporation*, 4 FCC Rcd 6292, 6294, 6300-01 (1989).

in the availability of more channels of programming to the public and more efficient use of the frequencies allocated to DBS. Further, Hughes states that its digital transmission technology will make possible the transmission and reception of High Definition Television (HDTV) signals and other video and audio services now under development. In addition, Hughes states that digital transmissions are less sensitive to interference than analog transmissions. With regard to its satellites' transmission antennas, Hughes states that its proposed system, as modified, would utilize a single feed horn and a shaped reflector, rather than a parabolic reflector fed by multiple feed horns as previously proposed, to produce the desired coverage pattern. This design modification will result in a significant reduction in the weight of the antenna subsystem, which can extend the operating life of the satellite. Further, according to Hughes, its modified antenna design entails less feed loss and therefore increases the available power of each transponder; and produces a more uniform coverage pattern and minimizes antenna gain variations in edge-of-coverage areas.

6. Hughes also states that utilization of digital transmission technology and a shaped-reflector antenna design on its satellite at 101^0W will enable it to employ a 120-watt transponder amplifier for each of the sixteen transponders in each satellite without requiring an increase in the size of subscribers' receive antennas. To provide for future flexibility, the sixteen transponder amplifiers will be paired so that they may be switched to create eight 240 watt transponder amplifiers. Hughes states that it intends to operate its two satellites at orbital position 101^0W in the 16-channel/120 watt mode, and is not requesting authority to operate in the 8-channel/240 watt mode at this time,[3] but that the interference analyses which it submitted to show compliance with international treaties and agreements demonstrate that operation in either mode would be in full compliance with applicable international interference limitations.

7. With regard to its satellite at 157^0W, Hughes states that it seeks to utilize dual-mode 60/120 watt transponder amplifiers in the same manner as the higher power dual-mode transponders in its satellites at 101^0W. Hughes further states that its 157^0W satellite will utilize lower power transponder amplifiers because that satellite will have twice as many transponders as the satellites at 101^0W and because it is intended to provide half-CONUS service rather than full-CONUS service. Hughes proposes to operate its 157^0W satellite in the 32-transponder/60 watt mode.

8. Finally, Hughes states that its requested modifications will entail minor changes in its construction schedule, but will not affect its ability to begin operation of its system by December 7, 1994, as required by the Commission's Rules. Attached to this application is a copy of Amendment 3 to Hughes contract with Hughes Aircraft Company ("HAC"), Hughes' satellite construction contractor, which consists of an amended construction milestone schedule for Hughes' satellites. According to the amended construction schedule there would be minor delays in the accomplishment of construction milestones scheduled during 1992 and 1993. For instance, the amended construction schedule indicates that the proposed modification would result in only a one-month delay (November, 1993, to December, 1993) in the delivery of Hughes' first satellite at the launch site. However, the amended construction schedule also states that the final two construction milestones, delivery at launch site of Hughes' second and third spacecraft, will be accomplished in March and July, respectively, of 1994, the same completion dates as those contained in Hughes previous construction schedule, and prior to the date upon which Hughes' system is required to be in operation by the Commission's Rules.

9. This request is a minor change because the proposed modification does not entail the use of any additional orbit/spectrum resources. *Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 FCC 2d 250, 252 (1983) ("*DBS Processing Procedures*"). In addition, Hughes has cited a number of public interest benefits which would accrue from the proposed modifications: *e.g.*, flexibility (potential adaptability to video compression, which will result in more channels of DBS service, and HDTV, which will result in higher quality DBS service); less sensitivity to interference; longer operating life of the satellites; and more uniform coverage pattern. Further, analysis by the Commission's staff of the data submitted by Hughes regarding its operation in the 16-channel/120 watt mode at 101^0W and in the 32-channel/60 watt mode at 157^0W indicates that the proposal complies with the requirements of international treaties and agreements. Finally, the amended construction milestone schedule submitted with Hughes' modification request indicates that Hughes' system would still be able to commence operation prior to December 7, 1994, as required by the Commission's Rules.[4] Accordingly, it appears that Hughes' modification request would serve the public interest, convenience and necessity, and therefore its modification application will be granted,[5] subject to certain conditions.

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[3] Hughes states that if it became necessary to reconfigure either or both of its 101^0W satellites to operate in the higher-power mode, thereby reducing the number of channels provided by the two satellites, it would seek authority from the Commission to launch additional satellites into that orbital location in order to continue providing the same number of channels of DBS service.

[4] The final milestones specified in Hughes' construction schedule address delivery of Hughes spececraft at the launch site, and do not indicate when the satellites are to be launched, or when service is to begin. However, since delivery of Hughes spacecraft is currently scheduled to be completed in July, 1994, five months before the date on which Hughes' system is required to be in operation, ample time should remain for launch of the satellites and initiation of service. Further, since the satellite construction contractor may not be providing launch services, the launch dates and dates of commencement of operation are not necessarily a required part of the construction milestone schedule. However, when arrangements for and dates of launch and commencement of operation are established, such information should be included in the semi-annual progress reports that DBS premittees are required to submit to the Commission.

[5] Hughes does not propose or request authority to operate its two 101^0W satellites in the 8-transponder 240 watt mode, or its 157^0W satellite in the 16-transponder 120 watt mode. Therefore, only the engineering data for operation of the 101^0W satellites in the 16-transponder/120 watt mode and the 157^0W satellite in the 32-transponder/60 watt mode has been analyzed for compliance with international agreements, and only those modes of operation are being authorized in this *Order*. If Hughes wishes to operate its 101^0W satellites in the 8-transponder/240 watt mode, or its 157^0W satellite in the 16-transponder/120 watt mode, it will be necessary to file an application for modification of its authorization.

10. Hughes proposes to utilize digital signal encoding to accomplish video compression, and asserts that this method of modulation will not cause or receive more interference than the FM video signal parameters used for planning purposes in the applicable international agreements. However, the Commission does not have the capability at this time to analyze the data submitted by Hughes in support of this aspect of its proposal. Accordingly, we will grant Hughes' modification application on the condition that the use of digital modulation as proposed therein will cause no more interference and will require no more interference protection than the FM video signal parameters used for planning purposes in the applicable international agreements.

11. *USSB Minor Modification Application; Hughes/USSB Joint Request for Exchange of Channels; and USSB Request for Extension of Time to Construct and Launch DBS Satellites.* USSB's minor modification application concerns only its authorization to operate a DBS satellite at orbital position 101^{0}W on channels 23, 25, 27, 29 and 31. The assignment to USSB of specific orbital positions and channels was based upon the determination that USSB had demonstrated due diligence by completing contracting with General Electric Company, Astro-Space Division ("GE Astro-Space"), for the construction of three satellites. *USSB/Channels, supra.* In its minor modification application, USSB states that it has entered into an agreement with Hughes to purchase a payload of five transponders on one of the Hughes satellites to be located at 101^{0}W; that the satellite components which it is purchasing from Hughes are specifically enumerated in the contract; that it will have "full operational control" over the five transponders it is purchasing from Hughes, enabling it to cease transmissions if it should become necessary to do so; and that it will have sole discretion as to the content of the programming to be transmitted over its five channels. Therefore, USSB seeks authority to (a)implement its five-channel service at 101^{0}W by utilizing five transponders on one of Hughes' 101^{0}W satellites rather than constructing and launching a separate five-channel GE Astro-Space satellite as previously proposed and approved;[6] and (b) modify the technical specifications of its 101^{0}W authorization to conform to the specifications of the Hughes satellite. USSB further states that the technical information and data submitted by Hughes in connection with its modification application demonstrate that operation of the shared Hughes/USSB satellite at 101^{0}W would be in compliance with applicable international treaties and agreements.

12. In their joint request for exchange of channels at orbital position 101^{0}W, the parties state that "[i]t is essential to USSB's business plan that its five-channel payload be located on...[Hughes'] first DBS satellite." The first Hughes satellite under construction and the first scheduled to be launched, HC5-2, is designed to operate on the even channels, 2-32, at orbital position 101^{0}W. Because USSB's currently assigned channels at 101^{0}W are odd-numbered channels 23, 25, 27, 29 and 31, the parties request that these channels be exchanged for five of Hughes' currently assigned even-numbered channels at 101^{0}W, 24, 26, 28, 30 and 32, to enable the USSB "payload" to be on the first Hughes satellite to be launched.[7] In addition, Hughes and USSB request that the exchange of assigned channels "not become effective until...[Hughes] delivers in-orbit USSB's five-channel payload...."

13. Finally, USSB's DBS system is required to be in operation by December 4, 1992. *USSB/Service*, 3 FCC Rcd at 6858, 6859-60, 6861. However, Hughes' DBS system is not required to be in operation until December 7, 1994. *Advanced*, 6 FCC Rcd at 2274. Accordingly, in its request for an extension of time within which to initiate service, USSB requests that the parties' scheduled completion dates "be reconciled" so that Hughes' first satellite at orbital position 101^{0}W may serve both permittees.

14. USSB's modification application and the Hughes/USSB joint request for exchange of channels are minor changes because they do not require the use of any additional orbit/spectrum resources. *DBS Processing Procedures, supra.* These minor change applications are substantively related to the Hughes modification request being granted in this *Order* (*see* paragraphs 4-9, *supra*). However, USSB's modification application and the Hughes/USSB joint request for exchange of channels inherently entail a minimum delay of fifteen months in the commencement of USSB's service at 101^{0}W[8] and USSB has requested an extension of time in which to commence operations.[9] Such a delay in the scheduled implementation of USSB's service is a detriment to the public interest, and must be weighed against any public interest benefits claimed in support of USSB's modification application and the Hughes/USSB joint request for exchange of channels. Thus, USSB's modification application and the Hughes/USSB joint request for exchange of channels must be addressed in connection with and in the context of USSB's request for extension of time.

15. In ruling on requests for extensions of time within which DBS permittees must initiate service pursuant to Section 100.19(b) of the Rules, the Commission has stated that "[t]he totality of circumstances -- those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public -- must be considered...." *USSB/Service*, 3 FCC Rcd at 6859.

16. Initially, we note that all of the technological advances and improvements cited as public interest benefits of approval of the Hughes modification request (flexibility/video compression/HDTV, less sensitivity to interference, etc.) would also constitute public interest benefits if USSB's operation at 101^{0}W were to incorporate the same technical advancements and improvements. The "ultimate goal of service to the public" clearly would be served if

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[6] In its "Application for Additional Time to Construct and Launch Direct Broadcast Satellites", USSB states that it continues to maintain its contractual commitments with GE Astro-Space for the satellites to be located at 110^{0}W and 148^{0}W. *See* paragraph 22, *infra*.

[7] The remainder of both parties' currently assigned channels and orbital positions would be unchanged by this request.

[8] USSB's DBS system is currently required to be in operation by December 4, 1992. *USSB/Service*, 3 FCC Rcd at 6858, 6859-60, 6861. According to the construction milestone schedule submitted by USSB as part of its satellite payload purchase/construction contract with Hughes, the USSB five-channel payload is to be delivered in orbit in March, 1994, fifteen months after USSB's current service commencement deadline. In its modification application, USSB states that its construction timetable "calls for in-orbit delivery...by June 30, 1994." This date is eighteen months after USSB's current service commencement deadline.

[9] USSB also seeks an extension of time for its service at 110^{0}W and 148^{0}W. *See* paragraph 22, *infra*.

USSB's DBS operation were able to incorporate the benefits of video compression (which is intended to multiply the number of channels of service available to the public) and HDTV (which will greatly improve the quality of the picture received by DBS viewers). Incorporation of these technical advances and improvements into USSB's operation at 101^0W is dependent upon its proposal to utilize five transponders on Hughes' satellite at that orbital location. In order for USSB to be able to utilize five transponders on Hughes' satellite at 101^0W, its launch date must, by definition, coincide with that of Hughes. Thus, we believe that "the ultimate goal of service to the public" would be advanced by a grant of USSB's request for extension of time within which to initiate service at orbital position 101^0W.

17. Further, it appears that the efforts made by USSB to establish its DBS system "reveal[] no lack of capability or committment." *USSB/Service*, 3 FCC Rcd at 6860. In a "Supplement to Application For Additional Time To Construct And Launch Direct Broadcast Satellites", filed April 22, 1992, USSB states that its principals have "expend[ed] considerable time, money and effort" in the development of its DBS system. With regard to its financial committment, USSB states that it has spent more than twenty-three million dollars to develop its DBS system, including a "substantial payment" to Hughes for its portion of the Hughes satellite to be located at 101^0W, and that it has arranged for the remainder of the financing for the completion and launch of that satellite. With regard to its efforts to establish its system, USSB states that a contract for a December, 1993 launch of the 101^0W satellite by Arianespace had been executed, and that contracts had been executed with various suppliers of DBS home receiving systems. USSB attaches to its April 22, 1992 submission a list of over 500 speeches made or meetings attended by principals of USSB regarding DBS since January, 1988. In a "Second Supplement to Application For Additional Time To Construct And Launch Direct Broadcast Satellites", filed August 14, 1992, USSB states that it has already paid Hughes 40 percent of the purchase price of its five channel payload on the Hughes 101^0W satellite, as called for in its payment schedule.

18. In view of the foregoing, when we consider "[t]he totality of circumstances – those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public..." (*USSB/Service*, 3 FCC Rcd at 6859), we believe that the grant of USSB's interdependent requests for modification of its authorization, exchange of channels with Hughes, and extension of time within which to initiate its DBS service at orbital position 101^0W, would serve the public interest, convenience and necessity. However, in order to grant these requests, we must determine whether USSB's contract with Hughes complies with the first component of the due diligence requirement.

19. In *Tempo Enterprises, Inc.*, 1 FCC Rcd 20, 21 (1986) ("*Tempo*"), the Commission articulated the basic foundation for demonstrating compliance with the first component of the due diligence requirement:

> There is a contract, signed by both parties, which contains no unresolved contingencies which could preclude substantial construction of the satellites. The essential terms of the contract are verified by the submission of relevant portions of the document or by the principal's sworn statement as to the contents, verified by...[the satellite construction contractor]. Specific satellites and their design characteristics are identified, and dates for the start and completion of construction are specified.

Id. at 21. In *USSB/Service*, 3 FCC Rcd at 6862 n.20, the Commission clarified the contractual details which must be provided to demonstrate due diligence. The contracts or contract descriptions must include "regular[,] specific construction progress milestones in the construction timetable", *id.* at 6861, and "payment schedules with sufficient specificity for the Commission to determine that the permittee is making a financial commitment to the construction of the satellite and to indicate that the milestones listed for the early stages of construction constitute meaningful levels of advancement in the satellite construction process."

20. In addition to the notification contained in its "Application for Minor Modification of Construction Permit" and its "Joint Request for Authorization of a Mutual Exchange of Channel Assignments at 101^0W", both filed on July 15, 1991, USSB filed a separate letter on the same date notifying the Commission of the execution of its contract with Hughes to purchase a payload of five transponders on Hughes' 101^0W satellite. Attached to the "Application for Minor Modification of Construction Permit" as Addendum A is a detailed description of the design characteristics and specifications of the satellite to be constructed by HAC. Attached to USSB's July 15, 1991 contract notification letter are letters from Stanley S. Hubbard, Chairman and Chief Executive Officer of USSB and Eddy W. Hartenstein, Senior Vice President of Hughes, verifying that the contract had been executed on June 3, 1991, and that the contract contained no unresolved contingencies which could preclude construction of the satellite. Attached to Mr. Hubbard's letter is a construction milestone schedule which specifies eight construction milestones between July, 1991 and March, 1994. On April 23, 1992, USSB submitted a payment schedule, the first payment, 33 percent of the total price was to be paid in June, 1991, upon execution of the contract between USSB and Hughes. The second payment, 8 percent of the contract price was to be paid in July, 1992. The third payment, 8 percent of the contract price, is to be paid in July, 1993. The fourth and final payment, 51 percent of the contract price, is to be paid in March, 1994. In a progress report filed on March 12, 1992, USSB reports that, as of that date, all construction milestones had been reached. Finally, as stated above, in its "Second Supplement to Application For Additional Time To Construct And Launch Direct Broadcast Satellites", filed August 14, 1992, USSB states that on July 2, 1992, it made the second payment called for in the payment schedule in its contract with Hughes and, as of that date, had paid 40 percent of the contract price to Hughes.

21. The essential terms of the contract between USSB and Hughes have been described in USSB's various submissions to the Commission and verified by statements by principals of both parties. That contract identifies a specific satellite and its design characteristics. We believe that the payment schedule, and particularly USSB's compliance with that payment schedule to date, are sufficient "to determine that the permittee is making a financial commitment to the construction of the satellite", *USSB/Service*, 3 FCC Rcd at 6862 n.20; and that USSB's milestone schedule, and compliance with that milestone schedule to date, "constitute meaningful levels of advancement in the satellite

construction process." *Id.* Accordingly, USSB's contract with Hughes complies with the first component of the due diligence requirement, and we may therefore grant its interdependent requests for exchange of channels with Hughes,[10] modification of its authorization,[11] and extension of time within which to initiate its DBS service at orbital position 101°W.

22. Finally, USSB also requests an extension of time within which to commence its service at orbital positions 110°W and 148°W. As stated above, USSB has continued to maintain its contractual commitments with GE Astro-Space for the satellites to be located at these two orbital positions. In its "Supplement to Application For Additional Time To Construct And Launch Direct Broadcast Satellites", filed April 22, 1992, USSB states that it has already paid 1.3 million dollars to GE Astro-Space (or its predecessor, RCA) for development of the satellites specified in their contract, and has made separate arrangements for the launch of those satellites by Arianespace, including payment of $100,000 for a launch reservation. In a "Second Supplement to Application For Additional Time To Construct And Launch Direct Broadcast Satellites", filed April 22, 1992, USSB states that it has executed Amendment No. 5 to its contract with GE Astro-Space. Attached to this submission is a redacted copy of Amendment No. 5 to the contract between USSB and GE Astro-Space, including a new construction milestone schedule and a new payment schedule. The new construction milestone schedule calls for completion of the 110°W satellite in January, 1997, and the 148°W satellite in July, 1997.

23. As stated above, in ruling on requests for extensions of time within which DBS permittees must initiate service, the Commission considers "[t]he totality of circumstances -- those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public...." *USSB/Service*, 3 FCC Rcd at 6859. In granting an extension of time to USSB in that Order, the Commission noted the efforts the permittee had expended to that date, and ruled that, in light of those efforts and the progress USSB had made, the "compelling interest of service to the public argues for granting the requested extension[] of time." *Id.* at 6860. The recitation of facts regarding USSB's current request for extension of time for its satellite at 101°W demonstrates that USSB has continued to expend substantial effort and money to establish its DBS system. In view of the considerable effort and money expended, the progress attained, and the overall contribution that USSB has made to the development of DBS, we believe that the "compelling interest of service to the public [still] argues for granting the requested extension[] of time." *Id.* at 6860. Accordingly, we will grant USSB an extension of time, until December 4, 1997, within which to commence service on its DBS system.

24. Accordingly, IT IS ORDERED, That the Application for Minor Modification of Construction Permit filed by Hughes (DBS-91-02MP/MINOR) IS GRANTED, SUBJECT TO THE FOLLOWING CONDITIONS:

> (i) that the use of digital modulation as proposed therein will cause no more interference and will require no more interference protection than the FM video signal parameters used for planning purposes in applicable international agreements; and
>
> (ii) that the permittee proceeds with due diligence in the construction of its proposed DBS system.

25. IT IS FURTHER ORDERED, That the Joint Request for Authorization of Mutual Exchange of Channel Assignments at 101°W filed by Hughes and USSB IS GRANTED.

26. IT IS FURTHER ORDERED, That the Application for Minor Modification of Construction Permit filed by USSB (DBS-91-01MP/MINOR) IS GRANTED, Subject to Conditions (i) and (ii) specified in paragraph 24, *supra*.

27. IT IS FURTHER ORDERED, That, pursuant to its Application for Additional Time to Construct and Launch Direct Broadcast Satellites (DBS-91-01MP/EXT), as supplemented, USSB is GRANTED an extension of time, until December 4, 1997, within which to initiate service on its authorized DBS system.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

[10] As stated above, Hughes and USSB request that the exchange of assigned channels "not become effective until...[Hughes] delivers in-orbit USSB's five-channel payload...." The parties assert that this delay in effectiveness is necessary because USSB would then be able to use its originally assigned odd-numbered channels on Hughes' second satellite "in the unlikely event" that Hughes first satellite, designed to operate on the even-numbered channels, "fails before it is put into service." Initially we note that Hughes first satellite is scheduled to be delivered in orbit in March, 1994. This would amount to a delay of approximately 18 months in the effectiveness of the grant of the request for exchange of channels. We do not believe that speculation concerning "the unlikely event" of failure of Hughes' first satellite justifies such an unprecedented delay in effectiveness of a Commission action. Accordingly, we hereby deny the request for delay in effectiveness. Should Hughes' first satellite fail, appropriate action can be taken at that time.

[11] As stated in paragraph 10, *supra*, Hughes proposes to utilize digital signal encoding to accomplish video compression, and the Commission does not have the capability at this time to analyze the data submitted by Hughes in support of its assertion that this method of modulation will not cause or receive more interference than the FM video signal parameters used for planning purposes in applicable international agreements. Accordingly, we will grant USSB's modification request on the same condition as attached to the grant of Hughes' modification request: that the use of digital modulation as proposed by Hughes will cause no more interference and will require no more interference protection than the FM video signal parameters used for planning purposes in the applicable international agreements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Stephen C. Bailey File No. 1175-CM-P-83

For Authority to Construct
and Operate a Multichannel
Multipoint Distribution
Service station on the
E-group channels at Maui,
Hawaii

ORDER ON RECONSIDERATION

Adopted: October 15, 1992; Released: October 22, 1992

By the Chief, Domestic Facilities Division:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the application of Stephen C. Bailey (Bailey) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Maui, Hawaii and for reinstatement of the application. For the reasons discussed below, we deny the petition.

I. BACKGROUND AND CONTENTIONS

2. As the result of a Commission lottery, Bailey's application was selected for qualification review pursuant to Section 21.32 of the Commission's rules, 47 C.F.R. § 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Mr. Bailey was legally, technically, financially, and otherwise qualified to be a licensee, and that grant of the application would serve the public interest. Mr. Bailey was notified of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days of the date of the deficiency letter. The deficiency letter also advised Bailey that failure to file the requested information within thirty days of the date of the letter could result in the dismissal of his application.

3. Subsequently, Bailey was granted three sixty-day extensions of time to respond to the deficiency letter. Bailey provided some, but not all, of the requested information necessary to complete processing of his application. For example, he failed to submit a signed lease or option agreement or demonstration of his current financial qualifications.

4. Pursuant to Sections 21.13(c), 21.20(d), and 21.28(d) of the Commission's rules, the Division dismissed, without prejudice, Bailey's application for failure to comply in a timely manner with its request for information.

5. Bailey filed a petition for reconsideration of the Division's dismissal action. He maintains that reinstatement of the application would be in the public interest because: (1) he advised the Commission of his difficulties in obtaining a lease or lease option agreement; (2) unforseen circumstances forced him to seek additional time to provide the requested transmitter site information; and (3) he has cured some of the remaining deficiencies on reconsideration. Bailey further states that reinstatement of his application would avoid the unnecessary long delay and commitment of resources required by reopening MMDS channels to lottery.

II. DISCUSSION

6. As of the date of the Division's dismissal action, and more than two and one-half years after the Division's request for information, Mr. Bailey still had not submitted the information necessary for evaluation of his qualifications to be an MMDS licensee. For example, he had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of his proposed transmitter site as required by Section 21.15(a) of the rules.[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to lottery. However, once the lottery is held, a license will not be granted until a fully-executed lease, option agreement or other concrete evidence of site availability is submitted. *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987). Thus, Mr. Bailey failed to satisfy the requirement that "concrete evidence" of site availability be provided by lottery winning applicants.

7. In addition, Bailey failed to submit the requested financial information within thirty days of the date of the deficiency letter, or prior to the expiration of its last requested extension. Bailey submitted a financial certification only after the dismissal of his application.

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[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. § 21.15(a); (2) carrier frequency information in Item 6(a) of FCC Form 435 pursuant to 47 C.F.R. 21.907(a); (3) current financial data, pursuant to 47 C.F.R. § 21.17(b); (3) a non-affiliation statement, pursuant to 47 C.F.R. § 21.900; (4) a non-interference analysis pursuant to 47 C.F.R. § 21.902(i).

[2] Section 21.15(a) provides *inter alia*: "Applicants proposing a new station location ... shall indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site shall be demonstrated. Under ordinary circumstances this requirement will be considered satisfied if the site is under lease or under written option to buy or lease. ..."

In addition, Mr. Bailey was required pursuant to Section 21.13(c) to submit a lease or option agreement after Division staff stated in the deficiency letter that a lease or option agreement was required for qualification review purposes and requested Bailey to submit it. Section 21.13(c) provides *inter alia:* "In addition to the general application requirements of §§ 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application... may require from any applicant... to enable it to determine whether a radio authorization should be granted...."

8. Bailey requested and received three 60-day extensions of time for the purpose of securing a lease or lease option agreement for a transmitter site and to prepare his financial certification. Thus, he was accorded ample time to comply with the Commission's request for information.

9. Bailey had a duty to submit curative amendments to his application within thirty days of the date of the deficiency letter, or to seek an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). His failure to submit curative amendments for almost three years substantially impeded the expeditious offering of MMDS at Maui.[3] In view of the foregoing, dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified.

III. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Stephen C. Bailey regarding his Maui, Hawaii MMDS application IS DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[3] Bailey did not submit the information requested to complete his application until two years and nine months after the date of the deficiency letter, when he submitted a lease option agreement and a financial certification with his reconsideration petition.

[4] In his Petition for Reconsideration, Bailey sought to amend his application by proposing a new transmitter site and argued that the amendment should be accepted as timely filed. Because Bailey's application will not be reinstated, and the Division's dismissal action is being upheld, the amendment is considered untimely filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Microwave Video Services, Inc. — File No. 9030-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Prescott, Arizona

ORDER ON RECONSIDERATION

Adopted: October 15, 1992; Released: October 22, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Microwave Video Services, Inc. (Microwave) requested reinstatement of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Prescott, Arizona, after its dismissal by the Domestic Facilities Division (Division) on delegated authority.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of this application, pursuant to 47 C.F.R. Sec. 21.32, and upon examination found the application contained several deficiencies that precluded the staff from making a finding that Microwave was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Microwave was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In this deficiency letter, Microwave was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Microwave provided some, but not all, of the information necessary to complete processing of its application. Pursuant to 47 C.F.R. Secs. 21.13(c), 21.20(d) and 21.28(d), and by letter dated almost 30 months after the deficiency letter, the Division dismissed Microwave's application for failure to comply in a timely manner with the Division's request for information. Although acknowledging that it had failed to completely submit the requested information, Microwave, on reconsideration, requests that its application be reinstated because: (1) "the owner (and President) of [Microwave] who had the responsibility of responding to the deficiency notice not only for [Microwave] but for numerous other tentative selectees, was simply unable to maintain the schedule of selectee obligations of [Microwave] or the others similarly situated;" (2) Microwave "did prosecute and pursue a number of its applications in various markets;" and (3) Microwave "was under the misapprehension that after the initial response to the deficiency notification, the applicant would be afforded whatever time was necessary under the circumstances to finalize the application."

4. *Discussion.* As of the date of the Division's dismissal action, Microwave still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Microwave had not submitted a lease, lease option agreement or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by 47 C.F.R. Sec. 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted.[3]

5. In addition, Microwave failed to submit the requested current financial qualification data prior to dismissal.[4] *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). Instead, Microwave submitted a second copy of the bank letter it had previously submitted, which had been determined to be inadequate in the deficiency letter. At the time Microwave submitted these bank letters, Section 21.17(e) of the rules required that a bank financing letter must provide loan details including: (a) letter com-

[1] The deficiencies cited were the absence of: (1) a public interest statement, pursuant to 21.13(a)(4); (2) a lease or option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (3) correct information for Federal Aviation Administration (FAA) air navigation hazard program compliance, as required by 47 C.F.R. Secs. 17.4(f) and 21.15(d); (4) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (5) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (6) the required tariff exhibit; (7) required information on station maintenance and emergency repairs, pursuant to 47 C.F.R. Sec. 21.15(e) and FCC Form 435 item 18; (8) answers to each of the questions on pages 5, 6 and 7 of the application, FCC Form 435; (9) the interference demonstration, required by 47 C.F.R. Sec. 21.901(d)(7); and (10) an Instructional Television Fixed Service (ITFS) interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Even if Microwave was not required to comply with the requirements of Section 21.15(a), it was required pursuant to 47 C.F.R. Sec. 21.13(c) to submit a lease or option agreement after the Division directed Microwave to submit the information in order to process its application. Section 21.13(a) provides *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

[4] Even if Microwave were not required to comply with the requirements of Section 21.17, Microwave was required, pursuant to Section 21.13(c) to submit in a timely manner the required financial demonstration after the Division directed Microwave to submit the information in order to process its application.

mitting the bank to making the loan; (b) transaction terms; and (c) a statement of compliance with ten-day default notice requirement. Microwave's bank letter instead merely indicated that the bank would be willing to negotiate with Microwave on financing. Thus, Microwave's submissions failed to comply with Section 21.17 requirements and the Commission's specific request.

6. Microwave also failed to submit the information necessary for compliance with FCC and Federal Aviation Administration (FAA) regulations concerning avoidance of air navigation hazards, and correct antenna structure height information, pursuant to 47 C.F.R. Secs. 21.15(d) and 17.4(f). *See also* 47 C.F.R. Sec. 21.15(c). Also, Microwave failed to comply with the request to submit a Section 21.902(i) ITFS non-interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Microwave failed to do so. *See Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

7. Microwave had a duty to submit curative amendments to its application within thirty days of the Division's written requests, or to obtain an extension of time.[5] *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for almost 30 months substantially impeded the expeditious offering of MMDS at Prescott. Also, Microwave's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *See By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Microwave had not provided the required current financial data or certification, the ITFS non-interference analysis, the correct information necessary for coordination with the FAA, or the required lease or option agreement. The Division was not in a position, therefore, to complete evaluation of Microwave's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

8. *Conclusion.* Having carefully considered the applicant's reinstatement request, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the request for reinstatement filed by Microwave Video Services, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[5] In response to Microwave's assertion that it "was aware of no Commission regulation establishing a time limitation on ... further responses" to Commission requests for information, we note that 47 C.F.R. Secs. 21.13(c), 21.20(d), 21.28(d), and 21.306 each establish a time limitation on responses to Commission requests for information. Microwave certified in its application that it had a copy of the Part 21 rules and was familiar with the rules contained therein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Communications Tech Management of Texas, Inc. — File No. 3224-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on the E-group channels at Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 1992; Released: October 22, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of Communications Tech Management of Texas, Inc. (Communications) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Los Angeles, California area was selected for qualification review as the result of a Commission lottery. The California State University (University), an Instructional Television Fixed Service (ITFS) licensee, filed a petition to deny the application of Communications. Communications filed a post-lottery major amendment, proposing to change its transmitter site. University filed a petition to deny the application, as amended.

2. *Petitions to Deny.* In its first petition to deny, University argues that there should be no disposition of Communications' MMDS application until after there is final disposition of the University's ITFS modification application and accompanying waiver request. University "requests that the Commission deny the issuance of a construction [authorization] to the tentative selectee in the instant proceeding, and decide the extent of [University's] grandfathered rights and interests prior to final authorization of the MMDS [authorization holder] in the Los Angeles market." University's Petition at 26. In its second petition to deny, University asserts that Communications' "proposed method of resolving the interference problem -- changes in the ITFS station WHG-268 facilities -- would degrade the University's current operations. Thus, the University objects to the [Communications] application." University's Petition at 2.

> [Communications'] proposal would fail to provide the required 45 dB desired/undesired signal ratio at each of the 48 authorized WHG-268 receive sites.[1]
>
> CTM proposes to resolve this problem by having the University change transmitting antennas, increase beam tilt, change polarization and add frequency offset. These changes, to be paid for by CTM, would supposedly provide the necessary 45 dB D/U ratio at all authorized WHG-268 receive sites having line of sight to the MMDS transmitter.
>
> Unfortunately, as explained in detail in the attached Engineering Analysis by Thomas Glab of Secure Business Communications, the proposed change in antenna would dramatically decrease the arc of the WHG-268 signal, degrading ITFS coverage at the outer edges of the current WHG-268 service area. Also, the increase in beam tilt would reduce the signal level received by current WHG-268 receive sites at a distance of 23 or more miles from the WHG-268 transmitter. The net result would be a reduction in signal strength at approximately one-half of the WHG-268 receive sites. The University regards that degradation as unacceptable, particularly in light of the fact that, at many of these sites, the ITFS signal must be further distributed throughout the site into individual classrooms.

Communications' Petition at 3-4.

3. *Discussion.* At the time Communications' MMDS application was filed, Section 21.902(i) imposed a duty on MMDS applicants to protect grandfathered E and F channel ITFS station licensees from harmful interference. At that time, 47 C.F.R. Sec. 21.902(i) stated:

> All [MMDS] applicants ... must, prior to receiving a construction [authorization] and at such time as the Commission requests, file with the Commission an analysis demonstrating that the facility to be constructed will not cause harmful interference to existing cochannel or adjacent channel Instructional Television Fixed Service receiver locations within 50 miles of the transmitter, or in the alternative, submit a statement from the ITFS licensee that the interference is acceptable.

On October 11, 1990, the Commission eliminated this pre-authorization requirement and eliminated the entire rule provision. Commission rules now require that an MMDS applicant file ITFS interference analyses *after* the MMDS application is granted. "MDS applicants for the E and F channels fil[ed] before October 11, 1990, must file the specified ITFS interference analysis and notification *after* a conditional license is granted, but before construction commences." *Report and Order, Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 5 FCC Rcd 6410 n.16 (1990)(hereinafter cited as *Wireless Cable Order)* (emphasis added); *see also Order on Reconsideration, id.*, 6 FCC Rcd 6764 (1991)(hereinafter cited as *Wireless Cable Reconsideration Order)*; *Second Report and Order, id.*, 6 FCC Rcd 6792 (1991)(hereinafter cited as *Second Wireless Cable Order)*. Communications' application was filed prior to October 11, 1990. Thus, it is required to file an ITFS interference analysis *after* grant of its MMDS application,

[1] A number of these sites would ostensibly be beyond the line of sight of the proposed MMDS station.

and prior to commencement of construction. The MMDS application of Communications' has not yet been granted. Consequently, the University's argument is premature.[2]

4. Although the University's opposition is now premature, we remind Communications that if its application is granted, it must file the ITFS interference analyses *prior to commencement of construction*. The analyses must demonstrate a lack of harmful interference to registered receive sites of grandfathered ITFS stations within 50 miles of its proposed transmitter site, *and* it must serve a copy of the interference analysis on each affected ITFS entity, *or* it must file a consent statement from such an ITFS licensee or construction permittee, *or* it must submit the appropriate modification application for the ITFS entity. *Id.* at n.16; *id.* at 6414-15; *Second Wireless Cable Order*, 6 FCC Rcd at 6798-99. *See also, Wireless Cable Reconsideration Order*, 6 FCC Rcd at 6771-73. The University may then file a petition to deny challenging the interference analysis. Communications may not commence construction until it fulfills its specified duty with regard to protection from harmful interference of grandfathered ITFS stations within 50 miles "to the extent of their service that [was] either in the operation or application stage as of May 26, 1983." *Order on Reconsideration, Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 98 FCC 2d 129, 132-133. (1984).

5. These interference analyses must comply with the requirements at 47 C.F.R. Secs. 21.901 and 21.902. Communications demonstrates its understanding in the analyses it has filed to date that, in order to meet the theoretical standards required, the interference analyses it submits must consider an ITFS station's registered receiver sites, not a theoretical arc of the ITFS station's service area. Communications' latest proposal is to provide the University, at its own expense, a new frequency offset transmitter and a new antenna for purposes of cross-polarization.

6. *Ordering Clause*. Accordingly, IT IS ORDERED that the petitions to deny filed by California State University concerning the above-referenced MMDS application of Communications Tech Management of Texas, Inc. at Los Angeles, California ARE HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[2] In addition, we note that, since the filing of the University's first petition, several new rules have been implemented to facilitate the resolution of potential interference problems between licensed ITFS stations and MMDS entities. On October 11, 1990, the Commission adopted specific rule provisions concerning frequency offset and ITFS facility modifications by MMDS entities, including ITFS receiver equipment upgrades. *Wireless Cable Order*, 5 FCC Rcd at 6410-23.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Microwave Video Services, Inc. — File No. 8986-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Lexington, Kentucky

ORDER ON RECONSIDERATION

Adopted: October 15, 1992; Released: October 22, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Microwave Video Services, Inc. (Microwave) requested reinstatement of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Lexington, Kentucky, after its dismissal by the Domestic Facilities Division (Division) on delegated authority.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of this application pursuant to 47 C.F.R. Sec. 21.32, and upon examination, found the application contained several deficiencies that precluded the staff from making a finding that Microwave was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Microwave was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In this deficiency letter, Microwave was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Microwave provided some, but not all, of the information necessary to complete processing of its application. Pursuant to 47 C.F.R. Secs. 21.13(c), 21.20(d) and 21.28(d), and by letter dated almost eighteen (18) months after the deficiency letter, the Division dismissed Microwave's application for failure to comply in a timely manner with the Division's request for information. Although acknowledging that it had failed to completely submit the requested information, Microwave requested that its application be reinstated. Microwave, however, presented no justification or basis for reinstatement.

4. *Discussion.* As of the date of the Division's dismissal action, almost 18 months after the Division's request for information, Microwave still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Microwave had not submitted a lease, lease option agreement or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by 47 C.F.R. Sec. 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted.[3]

5. In addition, Microwave failed to submit the requested current financial qualification data prior to dismissal.[4] *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). Microwave also failed to submit the information necessary for compliance with FCC and Federal Aviation Administration (FAA) regulations concerning avoidance of air navigation hazards, and correct antenna structure height information pursuant to 47 C.F.R. Secs. 21.15(d) and 17.4(f). *See also* 47 C.F.R. Sec. 21.15(c). Also, Microwave failed to comply with the request to submit a Section 21.902(i) ITFS non-interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or

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[1] The deficiencies cited were the absence of: (1) a public interest statement pursuant to 21.13(a)(4); (2) a lease or option agreement pursuant to 47 C.F.R. Sec. 21.15(a); (3) current financial qualification data pursuant to 47 C.F.R. Sec. 21.17; (4) correct antenna structure height; (5) a non-affiliation statement pursuant to 47 C.F.R. Sec. 21.900; (6) an Instructional Television Fixed Service (ITFS) non-interference analysis pursuant to 47 C.F.R. Sec. 21.902(i); (7) required information on station maintenance and emergency repairs, pursuant to 47 C.F.R. Sec. 21.15(e) and FCC Form 435 item 18; (8) answers to each of the questions on pages 5, 6 and 7 of the application, FCC Form 435; (9) the required tariff exhibit; and (10) the interference analysis required by 47 C.F.R. Sec. 21.901(d)(7).

[2] Even if Microwave was not required to comply with the requirements of Section 21.15(a), it was required pursuant to 47 C.F.R. Sec. 21.13(c) to submit a lease or option agreement after the Division stated in the deficiency letter that a lease or option agreement was required for qualification review purposes and directed Microwave to do so. Section 21.13(a) provides *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

[4] Even if Microwave were not required to comply with the requirements of Section 21.17, Microwave was required pursuant to Section 21.13(c) to submit in a timely manner the required financial demonstration after the Division stated in the deficiency letter that it was required for qualification review purposes and requested Microwave to submit it.

alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Microwave failed to submit the required analysis for almost 18 months after the analysis was requested. *See Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

6. Microwave had a duty to submit curative amendments to its application within thirty days of the Division's written requests, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for almost 18 months substantially impeded the expeditious offering of MMDS at Lexington.[5] Also, Microwave's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *See By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, and again as of the deadline for filing a petition for reconsideration, Microwave had not provided the required current financial data or certification, the ITFS non-interference analysis, the correct antenna structure height information necessary for coordination with the FAA, or the required lease or option agreement. The Division was not in a position, therefore, to complete evaluation of Microwave's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990)

7. *Conclusion.* Having carefully considered the applicant's reinstatement request, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the request for reinstatement filed by Microwave Video Services, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[5] Subsequently, the Division held another lottery to select for qualification review an MMDS application for the E-group channels at Lexington. It will now be possible to complete qualification review for this application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Whitney Communications Corp. — File No. 15993-CM-P-83

For Authority to Construct and Operate Multichannel Multipoint Distribution Service station on the F-group channels at Cambridge, Maryland

ORDER ON RECONSIDERATION

Adopted: October 15, 1992; Released: October 22, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Whitney Communications Corp. (Whitney) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Cambridge, Maryland, and requested reinstatement of its application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of this application pursuant to 47 C.F.R. Sec. 21.32, and upon examination, found the application contained several deficiencies that precluded the staff from making a finding that Whitney was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Whitney was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of each letter.[1] Whitney was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Whitney provided none of the information necessary to complete processing of its application. Pursuant to 47 C.F.R. Secs. 21.13(c), 21.20(d) and 21.28(d), and by a letter dated almost three (3) months after the deficiency letter, the Division dismissed Whitney's application for failure to comply in a timely manner with the Division's requests for information. In its petition for reconsideration, Whitney argues that its application should be reinstated because its "failure to timely respond to the ... deficiency letter was completely inadvertent, the result of an administrative oversight attributable[,] in part[,] to the fact that the attorney who handled this matter is no longer with this firm."[2]

4. *Discussion.* As of the date of the Division's dismissal action, Whitney still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Whitney had not submitted a lease, lease option agreement or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by 47 C.F.R. Sec. 21.15(a).[3] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted.[4] *Video/Multipoint, Inc.*, 6 FCC Rcd 5215, 5216 (1991).

5. In addition, Whitney failed to comply with the request to submit Section 21.902(i) ITFS non-interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Whitney failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).[5]

6. Whitney had a duty to submit curative amendments to its application within thirty days of the Division's written

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[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) correct antenna structure height information for Federal Aviation Administration (FAA) air navigation hazard program compliance, as required by 47 C.F.R. Secs. 47 C.F.C. Sec. 17.4(f) and 21.15(d); (3) a financial certification, pursuant to 47 C.F.R. Sec. 21.17; (4) non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; and (5) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Whitney's reconsideration supplement was filed after the deadline for submitting reconsideration petitions, pursuant to 47 C.F.R. Sec. 1.106, and therefore, was not considered.

[3] Even if Whitney was not required to comply with the requirements of Section 21.15(a), it was required pursuant to 47 C.F.R. Sec. 21.13(c) to submit a lease or option agreement after the Division stated in the deficiency letter that a lease or option agreement was required for qualification review purposes and directed Whitney to submit it. Section 21.13(a) provides *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[4] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

[5] Whitney also failed to submit required FAA information, a financial certification, and a non-affiliation statement.

request, or to obtain an extension of time.[6] *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). It is the responsibility of the applicant, not the applicant's attorney, to respond promptly to Commission requests for information. *Metrovision, Inc.*, 3 FCC Rcd 598, 600 (1988) ("[C]ompliance with Commission requirements is the permittee's obligation, not counsel's"); *Peninsula Television Relay Corp.*, 21 Rad. Reg. 644, 650 (1961) ("Peninsula has not exercised the degree of care necessary to effect explicit and precise compliance with our application processing requirements ... and has apparently relied too heavily on its counsel for ... this responsibility.").

7. Whitney's failure to submit curative amendments for almost three months substantially impeded the expeditious offering of MMDS at Cambridge. Also, Whitney's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Whitney had not provided any of the requested information. The Division was not in a position, therefore, to complete evaluation of Whitney's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

8. *Conclusion.* Having carefully considered all of the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified.[7] Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Whitney Communications Corp. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[6] The deficiency letter explicitly stated: "Your application must be amended to cure the listed deficiencies within 30 days of this letter's date. Failure to timely file this information could result in the dismissal of your application pursuant to Section 21.28(c) of the Commission's Rules." Thus, Whitney was provided sufficient warning in the deficiency letter that its failure to submit an amendment to cure any of its deficiencies, including a lack of ITFS analysis, could result in the dismissal of its application. In addition, Whitney certified in its original application that it was familiar with the Part 21 rules. The language of 47 C.F.R. Secs. 21.13(c), 21.20(d), 21.28(d), and 21.902(i) was clear that an MMDS applicant must submit its ITFS non-interference analysis at the time the Commission requests it.

[7] Due to our disposition of Whitney's petition for reconsideration, we hereby dismiss its motion for stay as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Multi-Micro, Inc. File No. 9414-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on F-group channels at
Gainesville, Florida

ORDER ON RECONSIDERATION

Adopted: October 19, 1992; Released: October 22, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Multi-Micro, Inc. filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Gainesville, Florida, and requested reinstatement of its application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of this application, pursuant to 47 C.F.R. Sec. 21.32, and upon examination, found the application contained several deficiencies that precluded the staff from making a finding that Multi-Micro was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Multi-Micro was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In this first deficiency letter, Multi-Micro was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.[2]

3. More than 25 months later, Multi-Micro provided a financial certification, but failed to provide a lease or option agreement and failed to provide an ITFS interference analysis, all information necessary to complete processing of its application. Pursuant to 47 C.F.R. Secs. 21.13(c), 21.20(d) and 21.28(d), and by letter dated almost four (4) years and four months after the first deficiency letter, the Division dismissed Multi-Micro's application for failure to comply in a timely manner with the Division's request for information. Although acknowledging in the instant petition that it had failed to submit all the requested information Multi-Micro argues that its application should be reinstated because: (1) it had decided prior to dismissal of its application not to spend the money in order to obtain a lease for a specified tower, (2) it had spent money for a lease after the dismissal, and (3) it should not be required to submit an ITFS interference analysis in a timely manner because "Section 21.902(i) makes clear that the Commission is not bound by a fixed deadline for the submission of interference statements, but has flexibility on this score." Multi-Micro's Petition at 6.

4. *Discussion.* As of the date of the Division's dismissal action, Multi-Micro still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Multi-Micro had not submitted a lease, lease option agreement or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a) of the Rules.[3] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement, or other concrete evidence of site availability must be submitted.[4] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. In addition, Multi-Micro failed to comply with the Division's request to submit a Section 21.902(i) ITFS non-interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Multi-Micro failed to submit the required analysis for almost four years and four months after the analysis was first requested. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

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[1] The deficiencies cited were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17(b); and (3) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Multi-Micro was sent a second deficiency letter which also cautioned against the failure to timely comply with the request for information.

[3] Even if Multi-Micro was not required to comply with the requirements of Section 21.15(a), it was required pursuant to 47 C.F.R. Sec. 21.13(c) to submit a lease or option agreement after the Division directed Multi-Micro to submit the information in order to process its application. Section 21.13(a) provides *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[4] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

6. Multi-Micro had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *Vision-Aire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for almost four years four months substantially impeded the expeditious offering of MMDS at Gainesville. Also, Multi-Micro's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *See By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, and again as of the deadline for filing a petition for reconsideration, Multi-Micro had not provided the required ITFS interference analysis. The Division was not in a position, therefore, to complete evaluation of Multi-Micro's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

7. *Conclusion.* Having carefully considered all of the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified.[5] Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Multi-Micro, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[5] Due to our disposition of Multi-Micro's petition for reconsideration, we hereby dismiss its motion for stay as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Figgie Communications, Inc. — File No. 4375-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Quincy, Illinois

ORDER ON RECONSIDERATION

Adopted: October 19, 1992; Released: October 22, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Figgie Communications, Inc. (Figgie) requested that the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Quincy, Illinois be set aside.[1]

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of this application, pursuant to 47 C.F.R. Sec. 21.32, and upon examination, found the application contained several deficiencies that precluded the staff from making a finding that Figgie was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Figgie was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[2] In this deficiency letter, Figgie was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Figgie provided some, but not all, of the information necessary to complete processing of its application. Pursuant to 47 C.F.R. Secs. 21.13(c), 21.20(d) and 21.28(d), the Division dismissed by letter Figgie's application for failure to comply in a timely manner with its request for information. Although acknowledging that it had failed to completely submit the requested information, Figgie requested that its application be reinstated. However, Figgie presents no justification or basis for reinstatement.

4. *Discussion.* As of the date of the Division's dismissal action, Figgie still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Figgie had not submitted a lease, lease option agreement or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by 47 C.F.R. Sec. 21.15(a).[3] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted.[4]

5. Also, Figgie failed to comply with the request to submit a Section 21.902(i) ITFS non-interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Figgie failed to submit the required analysis for more than 25 months after the analysis was requested. *See Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

6. Figgie had a duty to submit curative amendments to its application within thirty days of the Division's written requests, or to obtain an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for more than two years substantially impeded the expeditious offering of MMDS at Quincy. Also, Figgie's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *See By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Figgie had not provided the required ITFS interference analysis or the required lease or option agreement. The Division was not in a position, therefore, to complete evaluation of Figgie's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990)

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[1] Figgie may not request a set aside, pursuant to 47 C.F.R. Sec. 1.113, as a means to circumvent the filing requirements of 47 C.F.R. Sec. 1.106. Set aside actions, pursuant to Section 1.113, must be made *sua sponte*. Therefore, we treat Figgie's request as a request for reconsideration pursuant to 47 C.F.R. Sec. 1.106.

[2] The deficiencies cited were the absence of: (1) a lease or option agreement pursuant to 47 C.F.R. Sec. 21.15(a); (2) current financial qualification data pursuant to 47 C.F.R. Sec. 21.17; and (3) an Instructional Television Fixed Service (ITFS) interference analysis pursuant to 47 C.F.R. Sec. 21.902(i).

[3] Even if Figgie was not required to comply with the requirements of Section 21.15(a), it was required pursuant to 47 C.F.R. Sec. 21.13(c) to submit a lease or option agreement after the Division directed it to do so. Section 21.13(a) provides *inter alia*: "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[4] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

7. *Conclusion.* Having carefully considered the applicant's set aside/reinstatement request, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the request for set aside filed by Figgie Communications, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Multi-Point Television Distributors, Inc. File No. 9679-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the F-group channels at Montgomery, Alabama

ORDER ON RECONSIDERATION

Adopted: October 19, 1992; Released: October 22, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Multi-Point Television Distributors, Inc. (Multi-Point) requests reinstatement of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Montgomery, Alabama, after its dismissal by the Domestic Facilities Division (Division) on delegated authority.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of this application, pursuant to 47 C.F.R. Sec. 21.32, and upon examination, found the application contained several deficiencies that precluded the staff from making a finding that Multi-Point was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Multi-Point was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] In this deficiency letter, Multi-Point was also advised that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Multi-Point provided some, but not all, of the information necessary to complete processing of its application. Pursuant to 47 C.F.R. Secs. 21.13(c), 21.20(d) and 21.28(d), and by letter dated almost 6 months after the deficiency letter, the Division dismissed Multi-Point's application for failure to comply in a timely manner with the Division's request for information. Although acknowledging that it had failed to completely submit the requested information, Multi-Point requested that its application be reinstated because: (1) "a great deal of resources [were] directed into dealing with ... petitions to deny," (2) the applicant funneled resources into "active participation in the Wireless Cable Television Association," (3) the applicant lost its original transmitter site, and (3) the applicant has secured additional staff and better procedures to better enable it to perfect its application.

4. *Discussion.* As of the date of the Division's dismissal action, Multi-Point still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Multi-Point had not submitted a lease, lease option agreement or other "concrete evidence" to demonstrate the availability of its proposed transmitter site, as required by 47 C.F.R. Sec. 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted.[3]

5. In addition, Multi-Point failed to submit the requested current financial qualification data prior to dismissal.[4] *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). Instead, Multi-Point submitted a second copy of the bank letter it had previously submitted. This bank letter had been determined to be inadequate in the deficiency letter. Thus, its resubmission failed to cure the financial compliance defect. At the time Multi-Point submitted these bank letters, Section 21.17(e) required that a bank financing letter must provide loan details including: (a) a letter committing the bank to making the loan; (b) transaction terms; and (c) a statement of compliance with ten-day default notice requirement. Multi-Point's bank letters merely indicated that the bank would be willing to negotiate with Multi-Point on financing. Thus, the letters failed to comply with Section 21.17 requirements and the Commission's specific request.

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[1] The deficiencies cited were the absence of: (1) a public interest statement, pursuant to 21.13(a)(4); (2) a lease or option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (3) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (4) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (5) the required tariff exhibit, pursuant to item 29 of FCC Form 435 (*see* 47 C.F.R. Sec. 21.13(a)(3)); (6) required information on station maintenance and emergency repairs, pursuant to 47 C.F.R. Sec. 21.15(e) and FCC Form 435 item 18; (7) answers to each of the questions on pages 5, 6 and 7 of the application, FCC Form 435; (8) correct carrier frequencies data for item 6(a) of FCC Form 435; and (9) an Instructional Television Fixed Service (ITFS) interference analysis, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Even if Multi-Point was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to submit a lease or option agreement after the Division directed it to do so. Section 21.13(a) provides *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

[4] Even if Microwave were not required to comply with the requirements of Section 21.17, Microwave was required, pursuant to Section 21.13(c), to submit in a timely manner the required financial demonstration after the Division directed Microwave to do so. *See also* Section 21.13(a).

6. Multi-Point also failed to comply with the request to submit a Section 21.902(i) ITFS interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Multi-Point failed to submit the required analysis for almost 6 months after the analysis was requested. *See Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991). Also, Multi-Point failed to submit local emergency repair and maintenance procedures, as required by 47 C.F.R. Sec. 21.15(e).

7. Multi-Point had a duty to submit curative amendments to its application within thirty days of the Division's written requests, or to obtain an extension of time. *Vision-Aire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for almost 6 months substantially impeded the expeditious offering of MMDS at Montgomery. Also, Multi-Point's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *See By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Multi-Point had not provided the required current financial data, the ITFS interference analysis, emergency repair information, or the required lease or option agreement. The Division was not in a position, therefore, to complete evaluation of Multi-Point's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990)

8. *Conclusion.* Having carefully considered the applicant's reinstatement request, we find that dismissal of this application for failure to comply with the Division's request for information was proper, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the request for reinstatement filed by Multi-Point Television Distributors, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Broadcast Data Corporation — File No. 2274-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the F-group channels at Pueblo, Colorado

ORDER ON RECONSIDERATION

Adopted: October 19, 1992; Released: October 22, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Broadcast Data Corporation (Broadcast) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Pueblo, Colorado, and requested reinstatement of its application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of the application, pursuant to 47 C.F.R. Sec. 21.32, and upon examination found the application contained several deficiencies that precluded the staff from making a finding that Broadcast was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Broadcast was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] Broadcast was also advised in each deficiency letter that failure to file the requested information within thirty days could result in the dismissal of its application.[2]

3. After two extensions of time were granted, Broadcast provided some, but not all, of the requested information. Pursuant to 47 C.F.R. Secs. 21.13(c), 21.20(d) and 21.28(d), the Division dismissed by letter Broadcast's application for its failure to comply completely in a timely manner with the Division's requests for information. In its petition for reconsideration, Broadcast argues that this application should be reinstated because: (1) it had spent effort and money to comply with the requests for information, (2) there was a longer period of time between the date of the deficiency letter and the date of the dismissal action for some other MMDS applicants; and (3) it had provided some of the requested information.

4. *Discussion.* As of the date of the Division's dismissal action, Broadcast still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. Broadcast had not submitted a lease, lease option agreement or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by 47 C.F.R. Sec. 21.15(a).[3] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, option agreement or other concrete evidence of site availability must be submitted.[4] *Video/Multipoint, Inc.*, 6 FCC Rcd 5215, 5216 (Comm. Car. Bur. 1991).

5. With regard to Broadcast's allegation that all MMDS applicants did not receive a uniform period of time prior to dismissal, we note that while we do agree that it would have been more uniform to mail all MMDS applicants a deficiency letter on the same day, and later to dismiss all MMDS applications on the same day, the limited staff and resources available for MMDS processing preclude such a practice. Therefore, MMDS applications were dismissed at various lengths of time after the dates of the deficiency letters. In *Radio Telephone Service*, 63 FCC 2d 1126 (1977), the Commission stated that by "waiting close to six weeks beyond the deadline for a reply, the Bureau was more than lenient toward [the dismissed applicant] and quite justified in invoking Section 21.28(c)." Specifically with regard to the processing of MDS applications, the Common Carrier Bureau found that application processing should not be delayed for an indefinite period of time awaiting applicants to cure application deficiencies. *Digital Paging Systems, Inc.*, 2 FCC Rcd 1523, 1524 (1987).

6. Broadcast had a duty to submit all curative amendments to its application within thirty days of the Division's written request, or to obtain extensions of time. *VisionAire*,

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[1] The deficiencies cited in the letter were the absence of: (1) complete information for Federal Aviation Administration (FAA) air navigation hazard program compliance, as required by 47 C.F.R. Secs. 17.4(f) and 21.15(d); (2) financial certification, pursuant to 47 C.F.R. Sec. 21.17; (3) maintenance program information, pursuant to 47 C.F.R. Sec. 21.15(e); (4) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i); and (5) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a).

[2] A second deficiency letter sent to Broadcast also contained a dismissal warning.

[3] Even if Broadcast was not required to comply with the requirements of Section 21.15(a), it was required pursuant to 47 C.F.R. Sec. 21.13(c) to submit a lease or option agreement after the Division directed it to do so. Section 21.13(a) provides *inter alia:* "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[4] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*)

Inc., 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit complete information in a timely manner substantially impeded the expeditious offering of MMDS at Pueblo. *Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). Also, Broadcast's failure to respond in a timely manner to the Division's requests for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Broadcast had not provided the required lease or option agreement. The Division was not in a position, therefore, to complete evaluation of Broadcast's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

7. *Conclusion.* Having carefully considered all of the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of this action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Broadcast Data Corporation regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of DA 92-1521

IT&E Overseas, Inc. and
PCI Communications, Inc.

Petition for Emergency Relief
and Expedited Declaratory Ruling

ORDER EXTENDING TIME

Adopted: November 2, 1992; Released: November 5, 1992

By the Chief, Policy and Program Planning Division:

1. On June 2, 1992, the Commission required the Guam Telephone Authority (GTA) to show cause by July 10, 1992, why GTA should not file exchange access tariffs that comply with Sections 201 and 202 of the Communications Act.[1] On June 30, 1992, GTA filed a motion seeking a 120-day extension, until November 9, 1992. In supporting that request, GTA contended that it needed "additional time to complete internal studies . . ., to consult with policymakers on Guam, to discuss its options with its financing body, and to develop a consensus on how to proceed."[2] GTA stated that the additional time would provide a period during which GTA could work with the Commission "to develop interconnection charges on Guam that comply with Section[s] 201 and 202 of the Communications Act."[3]

2. On July 9, 1992, the Chief, Common Carrier Bureau, adopted an order that granted the requested 120-day extension, thereby giving GTA more than five months from the release of the initial order.[4] In granting that extension, the Chief, Common Carrier Bureau stated:

> a 120-day extension is appropriate if GTA, in good faith, is seeking . . . . the most effective way to develop exchange access charges that comply with Sections 201 and 202 of the Communications Act . . . [T]he approach suggested by GTA may ultimately require less time and conceivably consumer fewer resources, if it is successful.[5]

Given the exceptionally long extension that was granted, the *Extension Order* clearly expressed the expectation that no additional extensions of time would be requested by GTA.[6]

3. On September 3, 1992, six days after Typhoon Omar struck Guam, GTA requested an additional 60 days to respond to the *Show Cause Order*. Acknowledging that the initial 120-day extension was itself an extraordinary act, GTA nevertheless stated that Typhoon Omar had complicated GTA's efforts to respond, and that it is "unlikely that GTA will be able to comply with the [*Show Cause Order*] by November 9, 1992."[7] In requesting the second extension, GTA observed that "GTA's consultants will not be able to return to Guam for a number of weeks . . . [and] GTA's staff will not be able to continue its research for a similar length of time."[8] No additional analysis was provided to support the specific time period (*i.e.*, 60 days) for which the extension was requested.[9]

4. GTA subsequently transmitted a report from its Washington, D.C. accounting/telecommunications consultants.[10] The report stated that data processing will be completed during the week of October 26, and that GTA's Board of Directors should receive a draft report during the week of November 9, 1992.[11]

5. Based upon this information and GTA's request for an additional extension of time, we grant GTA's request in part. We will no longer require GTA to file its response to the Commission's show cause order by November 9. Instead, we will require GTA to file a report on November 9 describing the status of its traffic, separations, and rate base studies.[12] We also extend by 30 days the deadline for GTA to file its response to the Commission's Order of June 2, 1992.

6. ACCORDINGLY, IT IS ORDERED that GTA SHALL FILE its response to the Commission's Order of June 2, 1992 not later than December 9, 1992.

7. IT IS FURTHER ORDERED that interested parties may file comments on GTA's response not later than January 11, 1993.

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[1] IT&E Overseas, Inc. and PCI Communications, Inc. Petition for Emergency Relief and Expedited Declaratory Ruling, Memorandum Opinion and Order, 7 FCC Rcd 4023, 4027 (1992)("*Show Cause Order*").

[2] GTA Motion For Extension of Time (June 30, 1992) at 3, 2. GTA stated that the "internal studies" include "a seven day traffic study, a jurisdictional separations study using traditional Part 36 procedures, and a rate base cost analysis." *Id.* at n.2. GTA also stated that those studies must precede GTA's efforts to coordinate its response. *Id.*

[3] *Id.* at 2-3.

[4] In the Matter of IT&E Overseas, Inc. and PCI Communications, Inc. Petition for Emergency Relief and Expedited Declaratory Ruling (Com. Car. Bur. 1992)("*Extension Order*"); PCI Opposition (July 7, 1992) at 2 and Attachment A.

[5] *Extension Order* at para. 5.

[6] *Id.*

[7] GTA's Motion For Additional Extension Of Time (Sept. 3, 1992) at 3-4. IT&E Overseas, Inc. ("IT&E") initially opposed GTA's request for an additional extension of time because of GTA's decision to implement Feature Group D ("FGD") access. IT&E Motion (Sept. 22, 1992), IT&E Opposition To Motion For Additional Extension of Time (Sept. 22, 1992). PCI Communications, Inc. ("PCI") opposed IT&E's Motion as untimely. PCI Opposition to Motion (Oct. 5, 1992). However, on October 26, 1992, IT&E stated that in light of GTA's decision not to implement FGD access absent Commission direction, IT&E no longer objects to GTA's request for an additional extension of time. Letter from V. Toth, IT&E Counsel, to Chief, Common Carrier Bureau (Oct. 26, 1992).

[8] GTA Motion For Additional Extension Of Time (Sept. 3, 1992) at 3.

[9] *Id., passim.*

[10] Letter from V. Ahern, Counsel to GTA, to Chief, Common Carrier Bureau (Oct. 20, 1992) transmitting a report from Ernst & Young to J. Underwood, GTA (Oct. 16, 1992).

[11] *Id.*, Letter from D. L. Trampush, Ernst & Young to J. Underwood, GTA (Oct. 16, 1992) at 2 and attachments.

[12] *See generally id.* at 2 (description of studies being prepared by GTA's consultants).

8. IT IS FURTHER ORDERED that GTA shall file a report, as described in paragraph 5 *supra*, on or before November 9, 1992.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Chief, Policy and Program Planning Division

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-144

In the Matter of the Application

RICHARD A. BURTON
Harbor City, California

For Amateur Station and
Operator Licenses

Appearances

Kenneth Kahn on behalf of Richard A. Burton; and *Thomas D. Fitz-Gibbon* on behalf of the Chief, Private Radio Bureau.

DECISION

Adopted: October 29, 1992; Released: November 12, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

Board Member BLUMENTHAL:

1. The Board has before it the Exceptions of Richard A. Burton to the *Summary Decision*, 7 FCC Rcd 5481 (1992), of Administrative Law Judge Edward J. Kuhlmann (ALJ). It also has an Opposition To Exceptions filed by the Commission's Private Radio Bureau.

2. In reaction to a *Hearing Designation Order*, released June 29, 1992,[1] the ALJ ordered Burton to submit an outline of evidence and a witness list by July 29, 1992. Burton filed nothing, whereupon on July 31, 1992, the Bureau moved for summary decision on the designated issues,[2] citing Burton's history of prior violations (*see supra* note 1). Burton filed no immediate opposition to the Bureau's motion.

3. The *Summary Decision* not only accepted the Bureau's substantive arguments for denial of the subject applications, unopposed at that time by Burton, the ALJ also noted that "Burton has not prosecuted his application in this proceeding." *Id.*, at para. 4.

EXCEPTIONS

4. Burton makes several arguments to the Board. First, whereas Burton had originally thought to appear *pro se*, he filed through counsel a request for an extension of time to respond to the Bureau's July 31 motion for summary decision. However, Burton's time extension request was filed on August 19, but the ALJ had already "issued" his *Summary Decision* on August 18, the day before.[3] Burton excepts to the ALJ's grant of summary decision without first ruling on his late extension request.

5. Second, Burton claims a lack of notice in the Bureau's August 31 motion that summary decision might follow from his failure to timely submit an outline of evidence and a witness list. He claims that, to the extent that the *Summary Decision* was based on this evidentiary

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[1] 7 FCC Rcd 4329 (1992). The Bureau described the bases for the hearing designation in these terms:

> On September 11, 1981, the Bureau revoked Burton's amateur station license and affirmed the suspension of his operator license because of his willful and repeated violations of the Commission's Rules in the amateur services. *Order of Revocation and Affirmation*, PR Docket No. 81-444 (September 11, 1981). Following this action, Burton, on three separate occasions, was found in federal court to have transmitted in the amateur services without a Commission license. *United States of America v. Richard A. Burton*, No. CR 82-378-R (C.D. Cal. June 28, 1992)(conviction on four counts of transmitting without a license and two counts of transmitting obscene language); *United States of America v. Richard A. Burton*, No. 82-00378 (C.D. Cal. May 1, 1985)(finding violation of the terms of probation by operating a radio apparatus without a license, modifying sentence to include therapy); *United States of America v. Richard A. Burton*, No. CR-90-357-RMT (C.D. Cal. October 1, 1990)(conviction for transmitting without a license). *But see United States of America v. Richard A. Burton*, No. 82-1391 (9th Cir. October 25, 1983)(affirming the 1982 conviction for transmitting without a license, while overturning conviction for transmitting obscene language on First Amendment grounds).

Bureau Opposition at 3 n.1.

[2] The following issues were set for hearing:

> (a) To determine whether, in light of the license revocation/suspension and the convictions described above, Richard A. Burton is qualified to become a Commission licensee.
>
> (b) To determine, in light of the foregoing issue, whether granting Richard A. Burton's application would serve the public interest, convenience and necessity.

Summary Decision at para. 1.

[3] Burton, through counsel, alleges that the ALJ's secretary was notified on August 18, 1992 that an extension of time request was forthcoming. Exceptions at 3. Moreover, counsel now represents that Burton was ill, submitting a brief note from Burton's doctor dated August 6, 1992. That note, unverified and scribbled on a pharmaceutical prescription form, advises "[t]o whom it may concern" that, due to Burton's otherwise undescribed "medical condition," Burton cannot "partake in any AIR TRAVEL until his medical problems are resolved." *See id.* (and attachment "D" thereof).

failure, no proper notice was afforded, particularly in light of his later request for an extension of time to prepare such evidence.[4]

DISCUSSION

6. We must deny these exceptions. As to Burton's first ground, the law is clear that, while the Commission "may, of course, consider an applicant's *pro se* status, among other factors, in determining whether a *mistake* is excusable,"[5] we find no "mistake" here since the ALJ's July 29, 1992 submission deadline order was clear and Burton's *pro se* status does not excuse Burton's unexplained failure to comply. *See Silver Beehive Telephone Co.*, 34 FCC 2d 738, 739 (1972). Further, in the absence of any opposition to the Bureau's substantive motion, the ALJ could consider the Bureau's arguments on the merits, note the lack of any counter-arguments, and rule on the Bureau's motion. Burton's extension of time request, filed one day after *Summary Decision* had issued, could not and did not foreclose a ruling on the merits.[6]

7. Burton's second argument, *i.e.*, that the Bureau's July 31 motion failed to give notice that summary decision might follow a failure to respond to the Bureau, mixes apples and avocados. *Summary Decision* was based upon Burton's undenied "ten year history of violating the Communications Act." *Id.*, at para. 4. Though the ALJ also noted Burton's failure to prosecute, *see id.*, the Bureau certainly was under no special duty to republish Section 1.961(b) of the Commission's Rules in its request for summary decision on the merits.[7] Burton's failure to submit the evidentiary material called for by the ALJ, and his failure to even oppose the Bureau's request for summary decision on the merits of the case (prior to the issuance of the *Summary Decision)*, provided an ample basis for the *Summary Decision*.[8] That these pleading failures might have concurrently provided a procedural basis upon which to *dismiss* Burton's application (which the ALJ did *not* do) does not undercut the *Summary Decision;* even before the Board, Burton's exceptions do not challenge the substantive grounds for the ALJ's *denial* of Burton's application.[9]

8. ACCORDINGLY, IT IS ORDERED, That the application for amateur and operator licenses filed by Richard A. Burton IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

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[4] *See* Exceptions at 3-5.

[5] *Royce Int'l Broadcasting Co. v. FCC*, 820 F.2d 1332, 1334 (D.C. Cir. 1987)(emphasis added).

[6] While Burton's exceptions to the Board are cast solely in procedural terms, its "Response To Motion For Summary Decision," filed August 31, 1992 -- hence thirteen days after the *Summary Decision* issued -- argued that the ALJ could not grant summary decision based upon Burton's past criminal record, at least without an evidentiary hearing to evaluate Burton's prior conduct. Burton's underlying thesis is faulty, for a history of serious violations -- unchallenged here in any factual respect -- is a perfect basis upon which to deny an application. *See Weiner Broadcasting Co.*, 7 FCC Rcd 832 (Rev. Bd. 1992)(history of unlicensed operation adequate grounds for application denial). Burton was afforded the *right* to a hearing by virtue of 47 U.S.C. Section 309(e); by his inaction, *Summary Decision* on the issues properly followed.

[7] 47 CFR Section 1.961(b) reads as follows:

> Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will be without prejudice where an applicant has not yet been designated for hearing; such dismissal may be with prejudice after an application has been designated for hearing.

[8] *Compare, e.g., Beth Knight*, FCC 92-397, released September 10, 1992 affirming "*dismissal* of Knight's application for failure of proof and failure to prosecute... ." *Id.*, at para. 2 (emphasis added). Burton's applications were not dismissed, but *denied* on the merits.

[9] Because of Burton's lack of a substantive argument on the merits of the ALJ's application denial, we need spend little time on the procedural matters. However, we gratuitously observe that apart from alluding to an utterly undescribed "medical condition" that was said to have impeded Burton's ability for "air travel," no explanation is given for his failure to submit the evidentiary materials by July 29, 1992 or to *timely* request an extension to so file. No "good cause" appears to be pleaded for these failures; and the ALJ's "failure" to rule upon an extension request filed *after Summary Decision* had issued does not effect the validity of that *Decision*, nor does Burton's response to the Bureau -- filed thirteen days after the *Decision* had issued -- do so. *See* 47 CFR 1.251(b)(opposition to motions for *Summary Decision* must be filed with 14 days of motion).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 2, 1992

Released: November 2, 1992

Joseph A. Godles, Esq. B8330-M
Goldberg, Godles, Wiener
& Wright
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Godles:

This is in response to your October 6, 1992, complaint filed on behalf of Magda Monteil Davis, alleging that WQBA(AM), Miami, Florida, has violated the personal attack rule (47 C.F.R. 73.1920) and the Zapple Doctrine.

According to your complaint, Davis is the Democratic candidate for the House seat in the 18th Congressional District in Florida. Davis' opponent is the Republican incumbent, Ileana Ros-Lehtinen. You state that WQBA broadcasts a Spanish-language program series entitled in English, "As the World Turns," hosted by Mr. Aldeaseca. You describe the show as one that features Aldeaseca discussing his views on various topics and sometimes features guests.

First, you assert that Aldeaseca and his guests have favored the reelection of Ros-Lehtinen and opposed the election of Davis. As a result, you claim that Davis is entitled to a comparable amount of time to respond on the station under the Zapple Doctrine. Second, you claim that Aldeaseca and his guests have suggested that Davis is a Communist and is pro-Castro and that these remarks have been made during the discussion of a controversial issue of public importance. You contend that these statements constitute a personal attack under the Commission's rules, and afford you a reasonable opportunity to respond on the station.

According to your complaint, you wrote to WQBA requesting time under the above-mentioned rights, and the station denied your request. You attached a copy of the station's response to your complaint. WQBA responded voluntarily to the complaint on October 15, 1992, and states:

> o The complaint is too vague to establish a prima facie case against WQBA. The specific episode of the program containing the allegedly offensive material is not given, the specific language used is not identified, and the persons alleged to have made the statements are not identified.
>
> o Aldeaseca's show is a bona fide news interview program, therefore barring both the Zapple Doctrine and personal attack complaints.[1]
>
> o The Commission's enforcement of the Zapple Doctrine is unconstitutional, in light of the Commission's decision in which it determined that its continued enforcement of the fairness doctrine violated the First Amendment and was contrary to the public interest.[2]

You replied to WQBA's response on October 28, 1992. You argue that your claims arose from statements made by Aldeaseca during non-news interview portions of the programs and that these statements were actually commentary. As a result, you argue, Aldeaseca's comments are not subject to the news exemption. You also argue that the guests on the program are not selected on the basis of their newsworthiness, and since some of the guests appear regularly and are not identifiable news figures, they can only fairly be characterized as commentators. Finally, you argue that none of the persons identified as guests on the program have a news association with the race between Davis and her opponent. Therefore, any opinions offered by such persons concerning the race are personal and do not constitute bona fide news interviews.

DISCUSSION

Based on the foregoing, it does not appear that your complaint has established a prima facia case against WQBA. The complaint does not allege facts sufficient to support the claims that the station has violated the personal attack rule or the Zapple Doctrine.

Your failure to include a summary of any of the language used in the programs or list specific programs to support the complaint makes any determination by this Commission regarding the claims against WQBA virtually impossible. As to the personal attack claim,[3] the complaint does not specify what was said by either Aldeaseca or his guests. You assert that the statements on the program "sug-

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[1] WQBA asserts that the program has aired on WQBA for over 9 years and presently runs Monday through Friday, 6:00 pm to 8:00 pm. Further, it states that during the show Aldeaseca interviews community leaders and newsmakers to discuss current topics of interest to the community.

[2] *Syracuse Peace Council v. FCC*, 2 FCC Rcd 5043 (1987), *a'ffd.*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 717 (1990).

[3] Section 73.1920 states, in pertinent part:

> (a) When during the presentation of a controversial issue of public importance, an attack is made upon the honesty character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked:
>
> (1) Notification of the date, time and identification of the broadcast;
>
> (2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and
>
> (3) An offer of a reasonable opportunity to respond over the licensee's facilities.

gest" that Davis is a Communist and pro-Castro, but the specific words used are not given; nor is the person who uttered them identified. In addition, you have not established a prima facie case that the statement was made during the discussion of a controversial issue of public importance. It appears that the relevant statements may have been made during a discussion of the upcoming election, which would, absent highly unusual circumstances, be considered a controversial issue of public importance. However, the complaint failed to provide any specific information regarding what was being discussed at the time of the alleged personal attack.

Your Zapple Doctrine[4] claim fails for similar reasons. Without any specific information as to what was said, when, or by whom, the Commission is unable to make any determination regarding this claim. As a result, we find it unnecessary to reach the specific arguments raised in the complaint or the response.

CONCLUSION

Based on the foregoing, we find that your complaint has failed to establish a prima facie case that WQBA has violated the personal attack rule or the Zapple Doctrine. As a result, your complaint IS DISMISSED.

Staff action is taken here pursuant to delegated authority. Application for Review by the full Commission may be filed within thirty days of public notice of this letter (*see* Commission Rule 1.4(b)[47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. *See* Commission Rule Section 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

[4] The Zapple Doctrine provides that where Candidate A's supporters buy time in which to support A or criticize his opponent, and the advertisement does not qualify as a "use" under Section 315(a), then supporters of Candidate B are entitled to buy a comparable amount of time. This applies to free time given by the station as well. *See Nicholas Zapple*, 23 FCC 2d 707 (1970).

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 92-234

In the Matter of

Inquiry into Encryption
Technology for Satellite
Cable Programming

NOTICE OF INQUIRY

Adopted: October 8, 1992; Released: November 4, 1992

Comment Date: December 24, 1992
Reply Comment Date: January 8, 1993

By the Commission:

I. INTRODUCTION

1. By this *Notice of Inquiry* ("Notice"), the Commission undertakes its third examination of encryption technology for satellite cable programming.[1] The current proceeding responds to a request from members of Congress to "(1) review efforts to develop at least one additional source of video descrambling modules compatible with de facto industry standards for use of the C-band, and (2) review the feasibility of ensuring that all legal and compatible descrambling "modules be eligible for authorization through the Direct Broadcast Satellite (DBS) Authorization Center."[2] In addition to exploring these issues, we take this opportunity to address related technological issues, such as the feasibility and utility of a standard decoder interface that would permit a single integrated receiver descrambler or IRD (a satellite receiver with a built-in decoder) to function with multiple encryption systems, perhaps by use of separate smart cards,[3] and the implications of the apparent trend toward digital transmission of video, whether for ATV or compressed standard television signals, for encryption technology.[4]

2. In our 1990 encryption standards report, after declining to take additional regulatory measures, the Commission affirmed that "[D]evelopments with respect to encryption technology will certainly not be ignored by the Commission. Nor will we ignore evidence of abuse of their position by owners of any proprietary technology used in the encryption of satellite cable programming."[5] Moreover, we noted that, while a de facto industry encryption standard is in place, the possibility remains that "at some point, the consensus on encryption standards may break down in a way that imposes unacceptable burdens on consumers." This inquiry does not seek to reopen the issue of mandatory encryption standards. We continue to believe that competition in the home satellite dish (HSD) marketplace is likely to benefit consumers by providing an increasing range of choices both in program sources and in user-friendly reception equipment with sophisticated features and by holding down the prices of these goods and services. The public interest is well served when consumers have as wide as practicable a range of video service providers from which to choose. Moreover, the availability of reception equipment (including decoders for scrambled services) at reasonable prices is an important element in providing access for consumers to rival services. Consumers benefit from competition amongrival distributors of video services. Our examination of relevant developments in encryption technology is designed to explore the possibility that, with the introduction of new technologies, the "consensus on encryption standards" might weaken, and to explore the possible consequences and industry responses to such a change. While we remain optimistic that the increasingly competitive private sector can navigate this transition successfully, we believe it is prudent to inform ourselves about the relevant technical and marketplace developments.

3. This inquiry is, in part, a consequence of the commitment outlined in the previous paragraph. We seek to build a comprehensive record on the subject of encryption technology, primarily with respect to satellite signals but, to the extent that it is relevant to the satellite area, we seek information about other encryption developments as well.[6] As a threshold question, we ask if the historical description in Section II is complete and accurate, and if it is not, we request supplementary information. If commenters should recommend any specific Commission regulatory actions with regard to the questions and issues detailed below, we urge them to include a careful discussion of the Commission's jurisdiction in this area.

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[1] See *Report* in General Docket No. 86-336 ("*Scrambling Report*") 2 FCC Rcd. 1669 (1987); *Second Report* in General Docket No. 86-336 ("*Second Scrambling Report*") 3 FCC Rcd. 1202 (1988); *Report* in General Docket No. 89-78 ("*Encryption Standards Report*") 5 FCC Rcd. 2710 (1990).

[2] Letter of Edward J. Markey and C. Thomas McMillen, Members of Congress, to the Honorable Alfred Sikes, Chairman, Federal Communications Commission. July 6, 1992. See also Letters of the Honorable Alfred C. Sikes to the Honorable Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives and to the Honorable C. Thomas McMillen, U.S. House of Representatives. July 31, 1992.

[3] The standard decoder interface issue is also raised in a petition filed by the Consumer Satellite Coalition (CSC), which we address in this Notice. See Consumer Satellite Coalition. "*Petition for Inquiry/Hearing* For Removal of General Instrument Corporation's Decoder Monopoly Status In Home Satellite Dish Marketplace" ("*CSC Petition*") filed July 1, 1991.

[4] ATV is the acronym for advanced television, also sometimes referred to as high definition television (HDTV). NTSC stands for National Television Systems Committee and refers to the current broadcast television transmission standards in use in the United States.

[5] *Encryption Standards Report* at para. 73.

[6] We are not specifically requesting submission of any proprietary information. If any commenters choose to provide proprietary material, those submissions will be treated in accordance with relevant Commission rules. See 47 C.F.R. §§ 0.457(d), 459, and 461. *See also* 47 C.F.R. § 442.

II. BACKGROUND

4. Previous Commission reports provide a comprehensive history of the scrambling of satellite cable programming services.[7] In 1975, Home Box Office (HBO) became the first video network to use satellite distribution. Currently, all of the major cable networks use satellite distribution, and 14 local commercial television broadcast signals also are retransmitted by satellite carriers.[8] These satellite feeds deliver programming to cable system headends, satellite master antenna systems, "wireless cable" systems, commercial establishments such as hotels and bars, and individual households.

5. In 1982, HBO sought proposals for an encryption or "scrambling" system for its signals. While the avowed initial purpose was to stop commercial theft of service, during the three and one-half year development period, HBO added the second goal of creating a consumer market for subscription satellite services. The technology chosen, known as Videocipher II (VC II), was originally developed by M/A Com, Inc. On January 15, 1986, HBO began scrambling its satellite feeds. Other major programmers followed suit. Currently, virtually all of the American satellite cable programmers have scrambled their signals, and all of those that have scrambled have chosen the VC II technology. General Instrument Corporation (GIC) purchased the Videocipher Division of M/A Com, Inc. in September 1986.[9]

6. By virtue of the patent rights that it acquired from M/A Com, Inc., GIC has had exclusive control of VC II technology up to now. GIC has also made a series of proprietary advances in VC II technology. While GIC has licensed a second source manufacturer of VC II modules (Channel Master), that firm must purchase certain key components from GIC, as well as pay royalties to GIC. Roughly two dozen firms are licensed to insert VC II modules into their IRDs. In sum, GIC effectively controls the supply of VC II decoder modules.

7. There are various other encryption technologies available, but programmers have overwhelmingly chosen the VC II. Our earlier examinations of the home satellite dish (HSD) programming market indicated that there are substantial public and private benefits from an encryption standard, although we have twice found that a *mandatory* government standard is not in the public interest.[10]

8. Almost from the start, the VC II has been plagued by theft of service problems, commonly referred to as signal "piracy." While the encryption algorithm itself has remained secure, it turned out to be relatively easy to compromise the conditional access portion of the system, *i.e.*, the authorization and reauthorization function. While an exact estimate of the extent of piracy is impossible, it is generally agreed that at least 50 or 60 percent of the original VC II decoders that received subscription services were doing so without authorization.[11] These "pirate boxes" are physically altered by insertion of additional chips that, along with authorization data furnished by the provider of the pirate equipment, allow the decoder to decode signals for which no payment has been made or authorization obtained. In response to this, GIC developed a new generation of decoder, the VC II Plus, and halted production of the VC II in 1990. The VC II Plus utilizes a single, very large scale integrated (VLSI) chip, which has apparently proved secure up to now.

9. In early 1992, GIC, in cooperation with several major programmers, announced a "free upgrade" plan for all legitimate VC II subscribers to participating programmers. After the upgrade program is completed, probably in late 1992, the programmers plan to "turn off" their VC II authorization data streams, thus pulling the plug on the VC II pirates. The separate VC II Plus authorization data stream will remain in place. The modules being used for the upgrade and being sold in new systems today are designated VC II Plus RS (renewable security). They have a slot in the back that could accommodate a "smart card" or cartridge which could be used for a security upgrade in the event that the VC II Plus technology becomes compro-

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[7] This section draws on the detailed description of the history of satellite signal scrambling in *Scrambling Report*, paras. 29-58, *Second Scrambling Report*, paras. 15-33, and *Encryption Standards Report*.

[8] See, *e.g.*, "Satellite Orbit Extra," *Satellite Orbit*, September 1992. Along with the 14 scrambled commercial broadcast signals mentioned in the text, there is one scrambled PBS affiliate. In addition, there are three scrambled commercial broadcast signals and one scrambled PBS affiliate signal carried on a Canadian satellite. These are not generally available in the U.S.

The major commercial networks and PBS also use satellites to transmit their "network feeds." These include the feeds that the networks send to their affiliates, which contain the network's national programming and national commercials. The affiliates broadcast this material to viewers, sometimes immediately and sometimes not. The affiliates add local commercials and announcements before broadcast and may choose not to air portions of the network feed. The networks also transmit "backhaul feeds," which relay material such as news or sports events from a remote site to the network production center. Many of these feeds are scrambled, and the networks have plans to scramble the rest of them at some point. The Commission concluded that these are private transmissions not meant for the general public, and the networks do not offer them to dish owners or anyone else. See *Scrambling Report*, paras. 192-202. The networks use more secure encryption systems than the VC II for their network feeds (at correspondingly higher cost). Much syndicated programming also is distributed to stations via satellite.

[9] GIC has produced three separate generations of VC II decoder. The first version is known simply as Videocipher II (VC II). Next came the Videocipher II Plus (VC II Plus), which combined all of the security functions on a single very large scale integrated circuit chip and had other new features. See *Encryption Standards Report*, paras. 16-18. The Videocipher II Plus Renewable Security (VC II Plus RS) module uses the VC II Plus technology but also has a slot in the back for inserting a cartridge that could implement a security upgrade.

[10] See *Scrambling Report*, para. 223 and *Encryption Standards Report*, paras. 69-73.

[11] See *Encryption Standards Report*, para. 39. As of the end of August 1992, roughly 3.2 million HSD systems had been sold, and there were 861,271 legally authorized VC II decoders of various generations. See "Satellite System Sales," *Satellite Business News*, Sept. 9, 1992, p. 1. The approximately 2.3 million HSD systems without authorized VC II decoders include those with pirate decoders, those with no decoder at all, and those that have been scrapped or replaced.

mised. Such an upgrade presumably would be simpler and less expensive than the switchout of complete modules now taking place.

10. The wholesale price of VC II modules has increased significantly since they were first introduced, rising from $150 to around $330. While this increase has been accompanied by new features, including greater resistance to tampering, many in the industry believe that prices could and should be lower.[12] The advantages of maintaining a *de facto* standard such as the VC II have nonetheless kept programmers from adopting alternative technologies. Recently, however, the possibility of full competition in the production of VC II equipment has emerged. Titan Corporation acquired rights to the original VC II patents when it purchased a portion of M/A Com, Inc., but its purchase was subject to a five-year non-compete agreement with GIC. That agreement has now expired, and Titan has formed a joint venture to manufacture decoders.

11. In addition to manufacturing decoders, GIC operates a "DBS Authorization Center" for the benefit of the programmers that have chosen the VC II technology. Those programmers pay the full expenses of the DBS Center on a cost-sharing basis. In essence, the Center compiles and distributes an "authorization data stream," which includes information on the program services that each individual consumer decoder is authorized to receive. That data stream is delivered to the uplinks of all participating programmers, who insert it into their satellite feeds. Thus, each scrambled satellite feed includes the authorization information for all of the participating program channels. It appears, both from the nature of the authorization process and the fact that all programmers participate in the Center, that there are real economies of scale and scope in centralizing the authorization function.

III. COMPETITION IN THE PROVISION OF VC II DECODER MODULES

12. As noted above, currently GIC controls, directly or indirectly, the production of VC II decoder modules. There is, however, at least the potential for some competition in the fabrication of modules between GIC and Channel Master, the second source manufacturer,[13] and there are two dozen firms licensed to utilize the modules in IRDs. We seek comment on the significance of this competition and, in particular, on the extent to which there are differences in the price, terms, or conditions of sale of modules between GIC and Channel Master.

13. While the VC II Plus technology is proprietary to GIC, Titan Corporation, along with GIC, has rights to the initial VC II patents. While GIC's VC II system has been compromised and, indeed, is in the process of being phased out, the flaw has been in the conditional access portion of the technology rather than in the encryption algorithm itself.[14] For that reason, it is possible in principle for a secure version of the VC II to be developed.[15] Titan Corporation has formed Titan Satellite Systems Corp., a joint venture with Houston Satellite Systems, Inc. and Mr. Tom Ortolf, for the purpose of producing VC II modules.[16]

14. We wish to assess the potential benefits of "intra-VC II" competition.[17] How would it affect the price of decoder modules at the manufacturers' level and the price of IRDs at the retail level? What improvements, if any, in the security of encrypted satellite signals might competition bring, and how would it affect the cost of a security upgrade, should one become necessary?[18] To address these issues, we seek comment from Titan on its plans and prospects for competing with GIC in the supply of VC II modules. In particular, when does Titan expect to begin selling modules, and at what price? How is the price expected to change over time? While Titan's conditional access system will obviously be proprietary, what can Titan tell us about its security? If Titan plans to use a smart card, how much would a security upgrade cost? In this connection, we note that the current GIC consumer upgrade plan does not include commercial units. These units, located at the head-ends of cable systems and other commercial distributors of programming, still utilize the VC II technology, not the VC II Plus. We seek comment on the implications for the security of the GIC system of retaining the commercial VC II units. We also comment seek from GIC, from programmers, from program distributors, and others on whether and when the commercial VC II installed base should be upgraded. If such an upgrade were to happen, what effect, if any, would it have on the ability of Titan to compete with GIC in supplying decoder modules?

15. We are particularly interested in comments from equipment manufacturers on the viability and desirability of a non-GIC supplier of decoder modules. In what ways might such a supplier affect the design of their IRDs[19] and what might the consequences be for the retail price of IRDs and HSD systems in general?[20] We also seek comment from programmers about intra-VC II competition. What effect might it have on the volume of HSD subscribers? Is there any downside risk from confusion or imperfect compatibility between GIC and non-GIC VC II decoders? What other considerations are relevant to a pro-

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[12] See Bob Scherman, "Titan, Ergen, Ortolf Form Module Venture," *Satellite Business News*, July 1, 1992, pp. 1, 21 and "Congressmen Ask FCC to Study Titan Module," *Satellite Business News*, July 15, 1992, pp. 1, 22.

[13] See para. 6 above.

[14] See "Comments of General Instrument Corporation" in General Docket No. 89-78, filed June 19, 1989, pp. 11-14.

[15] We use the term "secure" advisedly. We assume that no encryption system is completely secure, particularly one designed to be inexpensive enough to be a mass market consumer product.

[16] Houston Satellite Systems, Inc. (HTS) is a satellite equipment manufacturer commonly owned with Echosphere Corp., another equipment manufacturer and also a major equipment distributor.

[17] The Congressional letter requesting this inquiry notes the possibility that "a new source of descrambling equipment would stimulate competition and growth throughout the satellite dish industry, and greatly would enhance its ability to serve as a competitive distributor of television services." The letter also points out that competition may reduce costs. See Letter of Honorable Edward J. Markey and C. Thomas McMillen, Members of Congress, to the Honorable Alfred Sikes, Chairman, Federal Communications Commission July 6, 1992.

[18] We reiterate that we are not soliciting submission of proprietary information. See note 6 above.

[19] For example, in a competitive situation, might GIC and/or a rival such as Titan offer its decoder in the form of a "chip set" rather than a fully fabricated module? Might this reduce IRD prices?

[20] Information relevant to this question includes cost data for GIC or Titan decoder modules, or cost data from other encryption systems including those in use overseas (*e.g.*, the system used by BSkyB, the British DBS service).

grammer's decision on whether to authorize non-GIC decoders? This last question encompasses the question of access to the GIC DBS Center.

IV. ACCESS TO THE DBS AUTHORIZATION CENTER

16. GIC operates a DBS Authorization Center in San Diego, California that all of the American satellite cable programmers use to authorize their HSD subscribers each month. The DBS Center receives information from programmers and their sales agents regarding subscribers to each service. The Center combines all of that information into an authorization data stream, which it then sends back to the uplink of all participating programmers for insertion into the programmers' satellite feeds. Thus, each satellite signal has embedded in it the authorization information for all subscribers and all participating channels. An individual HSD system needs to receive its authorization message on one channel to be authorized for all the channels to which the customer has subscribed. The decoders are reauthorized on a monthly basis, but the capacity of the authorization data stream is such that the reauthorization message for each individual decoder is sent many times per month, thus making it unlikely that a decoder will miss every reauthorization message because it was not turned on.

17. We understand that GIC claims to operate the DBS Center on a cost-sharing basis rather than for profit. The programmers and their authorized dealers share the cost of the DBS Center. It appears, then, that the DBS Center is operated on behalf of the programmers.

18. Because the mechanics of the Center's operation are complex, and because it is unclear where ultimate control of the DBS Center resides, we ask GIC, participating programmers, and any other relevant parties to describe how the DBS Center operates and explain who controls it. In particular, we are interested in the technical and contractual considerations that would need to be addressed if a programmer should wish to utilize the DBS Center to authorize non-GIC Videocipher decoders.[21] What software standards or protocols, if any, might be needed to ensure that the DBS Center could accommodate non-GIC decoders? How would this affect the cost of operating the Center?[22] How would this affect the security of the Center and the integrity of the conditional access systems (of GIC and others) that the Center might support? Specifically, we seek comment on the following security issues. Will it be more difficult to maintain security if the Center serves multiple systems? Will it be possible to insulate the systems from one another, so that, if one system is compromised, others are not? In this connection, commenters should address not only the operation of the DBS Center itself but the compilation and distribution to programmer uplinks of the authorization data streams as well. Will serving multiple systems make it more difficult or expensive to respond to security breaches of a particular system?

19. We are under the impression that DBS Center users also must use GIC-licensed software to insert the authorization data stream into their satellite signals at their uplink sites. We ask commenters to verify this and to comment on whether the need to use this software or the terms under which it is licensed are potential impediments to intra-VC II competition. With respect to contractual terms, what would happen if a programmer announced its desire to authorize non-GIC decoders via the Center? Would GIC agree to such operations? Do programmers have the contractual right to insist on them? In paragraph 14 above, we asked programmers to comment on the desirability of intra-VC II competition. We now ask for their comments on the desirability of access by GIC rivals to the DBS Center.[23]

20. As indicated above, we presume that there are economies from centralizing the decoder authorization function. In order to explore this presumption, we ask for whatever non-proprietary information is available on the operating costs of the DBS Center. We also seek estimates of the cost of setting up an alternative authorization center, including comment on the fixed costs of an alternate center and whether, other things equal, it would cost programmers more to interact with two authorization centers rather than one. We note that Titan plans to set up its own authorization center (although it would apparently prefer to utilize the GIC center), that the PrimeStar medium power Ku band service has its own authorization center, and that Hughes plans to set up its own center to authorize subscribers to its planned DirecTV service.[24] We would welcome the benefit of their experience in planning or implementing an authorization center. We also seek information on any other relevant subscriber authorization systems, such as those in use in Europe.

V. OTHER TECHNOLOGICAL ISSUES

21. The Videocipher II technology is certainly not the only encryption technology available today, and, of course, many new techniques are likely to develop, particularly those that exploit the possiblities inherent in all-digital video transmissions. We seek comment on what other encryption technologies are available and/or already in use for satellite cable programming and on the extent to which any of these systems provide or could provide meaningful competition to the VC II.[25] In addition to these existing systems, others are on the horizon. For example, Hughes

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[21] We assume that, for decoders not utilizing VC II technology, there are no particular economies of joint authorization with VC II decoders, but seek comment on this as well.

[22] In addition to the impact on costs, we also seek comment on how the costs would be apportioned in the event that the Center is used to authorize decoders from more than one manufacturer. To the extent that GIC, the Center's operator, incurs or has incurred any expenses not compensated by programmers, we seek comment on whether enforced access of rivals to the Center might blunt incentives for improvements in the GIC DBS Center and/or discourage other entities from establishing such centers.

[23] In this regard, we note press reports that two programmers receive a royalty for every decoder module GIC sells. See "Titan, Ortolf, Ergen Eye Module Venture," *Satellite Business News*, June 3, 1992, pp. 1, 22. If this is true, what, if any, implications does it have for assessing "the feasibility of ensuring that all legal and compatible descrambling modules be eligible for authorization" through the DBS Center? See para. 1 above.

[24] See Bob Scherman, "Titan, Ergen, Ortolf Form Module Venture," *Satellite Business News*, July 1, 1992, pp. 1, 21, and "Thomson Wins DirecTV Hardware Contract," *Satellite Business News*, Feb. 12, 1992, pp. 1, 4.

[25] We note that PrimeStar currently is providing a medium power Ku band satellite service, with programming encrypted using a Scientific Atlanta system. Primestar apparently plans to introduce digital compression to its service at some point. An-

and United States Satellite Broadcasting (USSB, a subsidiary of Hubbard Broadcasting) are planning to launch a DBS service in 1994. This service will make use of digital compression to transmit 128 or more NTSC signals from a single orbital slot.[26]

22. Additionally, the Commission is in the midst of a major effort to pick a standard for and facilitate the introduction of advanced television (ATV) service. Five of the six candidate systems are digital in nature. While the Commission's ATV proceeding aims to choose a terrestrial standard, that choice will likely affect the provision of service via other media and will undoubtedly affect the home reception and signal processing equipment that viewers will need.

23. Thus, the trend appears to be toward digital video transmissions, whether it be terrestrial ATV, DBS, or other satellite services. Among many advantages, digital transmission offers the possibility of more secure and cost-effective encryption of signals. However, the current VC II system is not digital compatible.[27] We seek comment on what options might be available to consumers as we move toward a world of digital video.

24. It is, of course, impossible to predict exactly which new services will be introduced, when they will be introduced, and when certain existing services would no longer be offered. Nevertheless, the possibilities outlined above strongly suggest that, at the minimum, there will be a significant transition period during which a wide range of incompatible satellite (and other) video services will be offered. We believe that it is important to gather information about technologies that will permit flexibility in the processing (including encryption and decryption) of the next generation of digital video services and technologies that might be available to smooth the transition from analog to digital transmissions.

25. We therefore seek comment on the extent to which future consumers will be faced with multiple, incompatible satellite and other video transmission technologies and on strategies for dealing with that situation. If the decoding/signal processing equipment is sufficiently inexpensive, then it might be viable for consumers simply to purchase multiple "decoders." Alternatively, there may be a place for a standard decoder interface, an idea proposed by a commenter in our original scrambling inquiry and revived two years ago by an editorial in a satellite industry trade publication.[28] In the satellite context, this would entail a satellite receiver with multiple "ports" or slots for cartridges or smart cards. Consumers would acquire cartridges for each encryption system they needed to decode programming. Each cartridge would be built to accommodate the standard decoder interface. We seek comment on the utility of this concept and on whether, if it is an efficient technique, market forces are likely to produce it.

26. As commenters address these issues, we urge them to bring to our attention any lessons for the future that they can draw from the HSD industry's experience with the VC II. However, we remind commenters that we have a separate proceeding open on ATV, and comments directed specifically to ATV should be submitted in that proceeding.

VI. CONCLUSIONS AND ADMINISTRATIVE MATTERS

27. Telecommunications technology is changing rapidly and the area of encryption for satellite cable programming is no exception. Substantial developments have occurred since our last report on encryption standards in 1990. We hope that this inquiry will yield important and useful information not only about competition in the provision of VC II decoder modules and the economics of the VC II authorization process, but also about possible alternative encryption technologies. Moreover, we hope that commenters will give us the benefit of their perspectives and analysis of the implications for encryption techniques of the trend toward digital transmission of video. Comments on how to deal with incompatible encryption systems, either during a technological transition period or over a longer period of time, are particularly welcome.

28. We note that the standard decoder interface proposal is raised in the CSC petition, and to the extent that this petition can be interpreted as requesting an inquiry (rather than a hearing) on this subject, we grant the petition. We deny the petition for a hearing. The petition also requests that the Commission review in detail the business practices of GIC. Some of the allegations in the CSC petition have been investigated and rejected by the Commission

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other Scientific Atlanta system, B-MAC, is now used for a number of individual pay-per-view events (such as championship boxing matches). Among the other firms offering encryption systems are Leitch and Oak-Orion. NBC uses the Leitch system for some of its network feeds, and ABC apparently plans to encrypt at least some network feeds with this system.

DecTec International Inc., a Canadian company, has developed a descrambling system that it claims is field programmable and can emulate a variety of encryption systems, including the VC II. GIC asserts that the DecTec system infringes on VC II patents and copyrights, and the two firms are involved in lawsuits in Canada. For information on DecTec, see "DecTec Claims Its Decoder Will Take 20% of GI's Market in First Year," *Communications Daily*, Jan.14, 1991, p. 7; "New Controversies in Videocipher Land: BlackCipher Gets More Attention," *Satellite Business News*, Nov. 28, 1990, pp. 1, 26; Bob Scherman, "John Grayson: the Picture Descrambles," *Satellite Business News*, Jan. 23, 1991, pp. 1, 29, 30; and "SBCA Offers Membership to DecTec," *Satellite Business News*, May 20, 1992, pp. 1, 21.

[26] There are nine DBS permittees. Press reports suggest that a venture of two of them, Hughes and USSB, may be the first to launch its service. See "Thomson Wins DirecTv Hardware Contract," *Satellite Business News*, Feb 12, 1992, pp. 1, 4, and Sean Anderson, "DBS Proponents Tell Dealers to Get Involved," *Satellite Business News*, Feb. 26, 1992, p. 12. See also Peter Lambert, "Hughes to Offer Cable Programmers Free DBS Ride," *Broadcasting*, April 27, 1992, p. 14 and "DBS Will Foster, Not Destroy, Localism, Says Hubbard," *Broadcasting*, June 8, 1992, p. 18. SkyPix, a proposed medium power Ku band compressed video service, has delayed its launch plans several times. See Bob Scherman, "SkyPix in Bankruptcy as Court Takes Control," *Satellite Business News*, Sept. 23, 1992, pp. 1, 22.

[27] Indeed, GIC's own Digicipher system, which is one of the contenders for the terrestrial ATV standard and can also be configured to transmit compressed standard television signals, is not compatible with the VC II.

[28] See "Comments of United States Satellite Broadcasting Company, Inc. in Gen. Docket No. 86-336," filed Oct. 20, 1986, pp. 12-13. See also "FCC Should Mandate An Encryption Standard Interface," *Satellite Business News*, July 11, 1990, pp. 24-26.

already.[29] Other concerns raised have been rendered moot by marketplace developments during the past several years.[30] Moreover, we believe that the relevant public policy issues relating to encryption are addressed in this Notice. For these reasons, we deny CSC's petition, except as specified above, and treat it as an informal comment in the current proceeding.

29. Accordingly, IT IS ORDERED that the Petition for Inquiry/Hearing of the CSC is DENIED, except as specified above.

30. This Notice is issued pursuant to authority contained in Sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended. 47 U.S.C. 154(i), 303(r), and 403. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 467 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before December 24, 1992, and reply comments on or before January 8, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Federal Communications Commission Reference Center, room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

31. For further information concerning this proceeding, contact Jonathan D. Levy, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[29] *Encryption Standards Report* at paras. 61-68.

[30] See, *e.g.*, *CSC Petition*, pp. 7-8 (complaint that GIC did not use epoxy to block access to the decoder chips in circuit boards for certain VC II models that have not been produced for over two years).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 30, 1992

Released: October 30, 1992

Mr. Daniel Becker
Becker for Congress
P.O. Box 845
Canton, Georgia 30114

Dear Mr. Becker:

This responds to your complaint, filed October 28, 1992, concerning the refusal of WAGA-TV, Atlanta, Georgia, to air your 30-minute political program "Abortion in America: the Real Story." WAGA-TV apparently recognizes your right as a federal candidate to seek "reasonable access" to its broadcast facilities under Section 312(a)(7) of the Communications Act and its obligation under Section 315(a) of the Act not to censor programming aired on behalf of political candidates. It appears, however, that WAGA-TV believes that your program includes indecent material and that if it were to broadcast this material outside of the indecency "safe harbor," it would violate the indecency prohibition contained in 18 U.S.C. Section 1464. Accordingly, WAGA-TV has offered to provide you with price and availability information for airing your advertisement in the safe harbor period, but has otherwise declined to accept the advertisement. You have asked the Commission to intervene to ensure that you are granted access to air the subject program.

The Commission and Bureau have declined to render indecency rulings in advance of broadcasts.[31] *See Letter to Christian Action Network* (MMB), released June 12, 1992 (Bureau declined to render indecency ruling in advance of broadcasts to avoid imposing prior restraints on protected speech). Thus, in light of WAGA-TV's determination that the program is indecent, your request presents a difficult issue involving the relationship between the provisions of the Communications Act, on the one hand, which require reasonable access to broadcast facilities by federal candidates and prohibit censorship by licensees of political candidates' messages, and the federal Criminal Code, on the other hand, which prohibits the broadcast of indecent material. Although the Commission has not previously decided how these competing statutory commands should be reconciled, the Commission's staff has informally opined that "[t]he application of both traditional norms of statutory construction as well as an analysis of the legislative evolution of Section 315 militates in favor of reading Section 1464 as an exception to Section 315." *Letter from Mark S. Fowler to Honorable Thomas A. Luken* ("Luken Letter"), dated January 19, 1984.

Under these circumstances, and until the Commission provides definitive guidance, the staff believes it would not be unreasonable for the licensee to rely on the informal staff opinion referred to above and conclude that Section 312(a)(7) does not require it to air, outside the "safe harbor", material that it reasonably and in good faith believes is indecent.

In a Public Notice issued today, the Commission has determined that further and comprehensive review of these complex issues is necessary and has sought public comment on these matters to enable it to address them fully. Therefore, although the licensee is permitted to rely on the prior informal staff opinion pending the Commission's determination, this letter should not be taken to suggest a predisposition by the Commission as to the final resolution of the issues discussed above.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

[31] By contrast, the Bureau did make an indecency ruling on a different anti-abortion advertisement after the ad had actually aired on a television station. *See Gillette Communications of Atlanta, Inc. and Kaye, Scholer, Fierman, Hays and Handler*, DA 92-1160 (MMB), released August 21, 1992. The Bureau concluded that the advertisement was not indecent and that licensees therefore could not "channel" the ad to the indecency safe harbor without running afoul of Sections 312(a)(7) and 315 of the Communications Act. The instant case presents the separate question of whether a licensee, in the absence of a Commission ruling as to whether a given political commercial is or is not indecent, may nonetheless channel the advertisement to the indecency safe harbor where it reasonably and in good faith determines that the ad is indecent.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-245

In the Matter of

Amendment of Section 73.202(b) RM-8026
Table of Allotments,
FM Broadcast Stations.
(Frederiksted, Virgin Islands)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 1, 1992; Released: November 12, 1992

Comment Date: January 4, 1993
Reply Comment Date: January 19, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jose J. Arzuaga ("petitioner"), proposing the allotment of Channel 266A at Frederiksted, Virgin Islands. Petitioner states that he will apply for the channel, if allotted.

2. Our engineering analysis indicates that Channel 266A conflicts with a pending proposal for Channel 267B, Charlotte Amalie, Virgin Islands (RM-8027). However, in an effort to accommodate petitioner's proposal, an alternate Class A channel has been found to avoid the conflict. We believe the public interest would be served by proposing the allotment of Channel 298A at Frederiksted, since it would provide the community with its second local FM transmission service.[1] Channel 298A can be allotted to Frederiksted in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Frederiksted, Virgin Islands	278A	278A, 298A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 4, 1993,** and reply comments on or before **January 19, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jose J. Arzuaga
P.O. Box 980
Quebradillas, Puerto Rico 00742
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] We note that Judith Mendez has filed a proposal in MM Docket No. 87-327, 2 FCC Rcd 5202 (1987), requesting the allotment of Channel 278A at Frederiksted as the community's first local FM transmission service.

[2] The coordinates for Channel 298A at Frederiksted are North Latitude 17-42-48 and West Longitude 64-53-00.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GE AMERICAN COMMUNICATIONS, INC. File No. I-T-C-92-148

Application for authority under Section 214 of the Communications Act of 1934, as amended, to establish channels of communication for the provision of authorized communications services between the United States and various international points via the INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites, the Alpha Lyracom's PAS satellite, the TDRSS-41 and TDRSS-174 satellites, and the Intersputnik Statsionar 4 satellites.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 27, 1992; Released: November 12, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of IBS and international television and program audio services to the general public by GE American Communications, Inc. (GE American) as indicated herein.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-148 IS GRANTED, and GE American is authorized to:

a. establish channels of communications between appropriately licensed earth stations in the United States and the appropriate INTELSAT AOR and POR satellites for the provision of IBS, television and program audio services between the United States and those AOR and POR countries listed in Comsat tariffs for such services;

b. establish four (4) 36-MHz circuits over appropriately licensed earth stations in the U.S. and Alpha Lyracom's PAS-1 satellite for the provision of full-time video and occasional video services between the U.S. and the following countries: (1) Ku-band--the Bahamas, Denmark, France, Germany, Ireland, Italy, Luxembourg, Monaco, the Netherlands, Portugal, Sweden, and the United Kingdom; (2) C-band--Argentina, the Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Honduras and Peru;

c. establish a total of two (2) 36-MHz circuits over appropriately licensed earth stations in the U.S. and the Columbia satellites, TDRSS-41 (1 36-MHz circuits) and TDRSS-174 (1 36-MHz circuits) located at 41^0 and 174^0 W.L. respectively, for the provision of full-time video and occasional video services between the U.S. and the United Kingdom and Hong Kong; and

d. establish one (1) 36-MHz circuit, between appropriately licensed satellite earth station in the U.S. and the Intersputnik Statsionar 4 located at 14^0 W.L.[1] for the provision of full-time video and occasional video services between the U.S. and Armenia, Azerbiajan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, Poland, Hungary, Albania, Romania, Czechoslovakia, and Bulgaria.[2]

3. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit addition reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. §63.10(b), for INTELSAT circuits.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61.

5. IT IS FURTHER ORDERED that the applicant shall submit monthly reports detailing the number and capacity of circuits in use over the TDRSS-41, TDRSS-174, and PAS-1, and Intersputnik satellites. These reports shall be filed no later than the 20th day of each month and shall include the required information for the previous month.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by

[1] The State Department has informed the Commission that U.S. obligations under the INTELSAT Agreement have been met since INTELSAT has favorably consulted the provision of non-switched services via the Intersputnik System. *See* Letter from Steven W. Lett, Deputy Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, Department of State, to George Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (Dec. 19, 1990).

[2] Under similar circumstances, the Commission has authorized the use of the Intersputnik system to provide television news coverage and private line service between the U.S. and Russia and Eastern European countries not members of INTELSAT. *See* IDB Communications Group, Inc. *et al.*, 6 FCC Rcd 2932 (1991) and 7 FCC Rcd 1599 (1992); CICI, Inc., 6 FCC Rcd 4289 (1991). *See also* IDB Communications Group, Inc. 7 FCC Rcd 2263 (1992).

reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it are parties.

8. IT IS FURTHER ORDERED that the applicant is authorized to provide IBS, international television, audio and video services using appropriately authorized earth stations, or future earth stations which may be authorized, in the U.S., to communicate with the above-referenced satellites. Should the applicant wish to construct its own earth station facilities to provide these services, an appropriate application under Title III of the Communications Act will be required.

9. IT IS FURTHER ORDERED that any authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and the points referenced in paragraph 2 of this Order -- that is, private lines which originate in the United States and terminate in the points referenced in paragraph 2 or which originate in the points referenced in paragraph 2 and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that the applicant's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the countries referenced in paragraph 2 afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

10. IT IS FURTHER ORDERED that the applicant shall apply for separate Section 214 authorizations for the use of any additional circuits over the PAS-1, the TDRSS-41, TDRSS-174, or the Intersputnik Statsionar 4 separate systems.

11. IT IS FURTHER ORDERED that the continued effectiveness of this authorization to provide service over the Intersputnik system is conditioned on the outcome of a review after six months by the State Department and the Commission as specified in paragraph 11 of the Commission's Order DA 91-621 (*see* 6 FCC Rcd 2932 (1991)). If the Commission is notified by the State Department that the continued use of the Intersputnik system is no longer in the national interest, then the authorization to communicate with the Intersputnik system will be subject to cancellation.

12. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its foreign correspondents. A copy of each of the agreements shall be filed with the Commission within 30 days of its execution.

13. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEMANAGEMENT COMMUNICATIONS CORP. Application for authority to operate as an international resale carrier.	File No. I-T-C-92-219
KELLEE COMMUNICATIONS GROUP, INC. Application for authority to operate as an international resale carrier.	File No. I-T-C-92-222
AMERICAN PUBLIC & PRIVATE COMMUNICATIONS, INC. Application for authority to operate as an international resale carrier.	File No. I-T-C-92-223
PENNSYLVANIA ALTERNATIVE COMMUNICATIONS, INC. Application for authority to operate as an international resale carrier.	File No. I-T-C-92-224
UNITED TELEPHONE LONG DISTANCE OF INDIANA, INC. Application for authority to operate as an international resale carrier.	File No. I-T-C-92-225
LD SERVICES, INC. Application for authority to operate as an international resale carrier.	File No. I-T-C-92-226

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 29, 1992; Released: November 12, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public on a resale basis by Telemanagement Communications Corp. (TCC), Kellee Communications Group, Inc. (Kellee), American Public & Private Communications, Inc. (American), Pennsylvania Alternative Communications, Inc. (PACE), United Telephone Long Distance of India, Inc. (UTLD-IN) and LD Services, Inc. (LD).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-219, I-T-C-92-222, I-T-C-92-223, I-T-C-92-224, I-T-C-92-225 and I-T-C-92-226 ARE GRANTED; and

a. TCC is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 1 and TRT's Tariff F.C.C. No. 15 between the U.S. and international points listed in those tariffs;

b. Kellee is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and international points listed in those tariff;

c. American is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2 and C&W's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs;

d. PACE is authorized to provide international switched voice services by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 3, TRT's Tariff F.C.C. No. 15 and Litel's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs;

e. UTLD-IN is authorized to provide international switched voice service by the resale of the international switched voice services set forth in Advanced Telecommunications Corp.'s Tariff F.C.C. No. 2, AT&T's Tariffs F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 3, Litel's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, Metromedia's Tariff F.C.C. No. 2, US Sprint's Tariffs F.C.C. Nos. 1 and 2, and WilTel's Tariffs F.C.C. Nos. 1 and 2, between the U.S. and international points listed in those tariffs; and

f. LD is authorized to provide international switched voice services by the resale of the international switched voice set forth in AT&T's Tariffs F.C.C.

Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Sections 22.117(b) and 22.9(d) of the Commission's Rules for Common Carriers — File No. MSD-93-3

ORDER

Adopted: October 30, 1992; Released: November 13, 1992

By the Chief, Common Carrier Bureau:

1. Pursuant to an agency-to-agency understanding between the Federal Communications Commission and the Canadian Department of Communications, the Common Carrier Bureau (the Bureau) have amended their interim coordination agreement for sharing arrangements in portions of the 929-932 MHz band. The agreement, which is applicable only to common carrier licensees, eliminates the need for coordination of the 931 MHz paging frequencies assignable by the United States Government above lines "A"and "C". Consequently, the Bureau will no longer require in the 931 MHz band prior Commission approval for additional transmitter locations and modifications above lines "A" and "C" that fall within Sections 22.117(b)(2) and 22.9(d)(4) and (6) of the Commission's Rules. Compliance with these rules in all other aspects is required, however. These changes may now be made by the use of FCC Form 489.

2. Accordingly, IT IS ORDERED, That Sections 22.117(b)(2) and 22.9(d)(4) and (6) of the Commission's Rules, 47 C.F.R. §§ 22.117(b)(2), 22.9(d)(4), (6), with regard to the 931 MHz paging frequencies ARE WAIVED for common carriers, pending further action by the Commission.

3. IT IS FURTHER ORDERED, That this Order shall take effect upon the date of its release.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 12, 1992

CABLE ACT OF 1992 PROVISIONS REGARDING THE EMERGENCY BROADCAST SYSTEM

FO Docket No. 91-301
FO Docket No. 91-171

On October 8, 1992, the Commission released its Notice of Proposed Rule Making/Further Notice of Proposed Rule Making, FO Dockets 91-301 and 91-171, FCC 92-439, 7 FCC Rcd _____ (1992). A substantive portion of the item addressed including the cable industry as a partner in the Emergency Broadcast System (EBS) and sought comments on our proposals. Comments are due **January 15, 1993** and reply comments are due **February 16, 1993.**

On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, became law. That Act amends the Communications Act of 1934 by, among other things, adding a provision at the end of Section 624, 47 U.S.C. 544 which states that "... each cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system pursuant to Commission regulations in subpart G of part 73, title 47, Code of Federal Regulations."

The "Joint Explanatory Statement of the Committee of Conference" provides that the emergency announcements section:

> Requires the Commission to prescribe, and cable operators to comply with, standards to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system (EBS) pursuant to Commission regulations in subpart G of part 73, title 47, Code of Federal Regulations.

House Committee on Energy and Commerce, H.R. Rep. No. 102-862, 102d Cong., 2d Sess. (1992), reprinted at Cong. Rec. H 8308 (daily ed. Sept. 14, 1992).

Parties should be mindful of this amendment to the Act in filing their comments and are specifically invited to address their comments to it.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suspension of Licenses of

THOMAS M. HAYNIE
General Radiotelephone
Operator License PG-6-9934

and

Amateur Advanced Class Radio

and

Revocation of License of
Thomas M. Haynie
Amateur Radio Station WB4PVK

ORDER OF REVOCATION AND AFFIRMATION

Adopted: November 2, 1992; Released: November 12, 1992

1. An *Order to Show Cause and Suspension Order*, 7 FCC Rcd 4994, (Field Operations Bureau, Private Radio Bureau), released July 31, 1992, directed the captioned licensee to show cause why his Amateur Radio Station License, WB4PVK (amateur station), should not be revoked; the Order suspended Haynie's General Radiotelephone Operator License PG-6-9934 (GROL) and Amateur Advanced Class Radio Operator License (amateur operator's license) for the remainder of the license terms, and notified Haynie of his right to a hearing on the suspension Orders. These actions were taken in light of the licensee's conviction of one count of criminal felony violation of 18 U.S.C. § 1367(a) (regarding the causing of an intentional interference to the operation of a communications satellite), and one count of criminal violation of 47 U.S.C. § 301 (regarding the unauthorized operation of a satellite uplink transmitter):

2. Mr. Haynie's convictions were affirmed on appeal to the U.S. Court of Appeals for the Fourth Circuit. *See United States v. Haynie*, No. 91-5000 (Fourth Cir., August 14, 1991) (Unpublished). In accordance with Sections 303 and 312 of the Act, 47 U.S.C. §§ 303, 312, and Sections 1.85 and 1.91 of the Commission's Rules, 47 C.F.R §§ 1.85, 1.91, Mr. Haynie was informed of his right to a hearing before the Commission. Mr. Haynie chose not to request a hearing, but has submitted a written statement urging the Bureaus to review the decision to revoke his amateur radio station and suspend his amateur radio operator's license.

3. Upon consideration of Thomas M. Haynie's letter of August 4, 1992, the suspension of the licensee's commercial radio operator license (General Radiotelephone Operator License PG-6-9934) is AFFIRMED. Mr. Haynie did not submit any written information which addressed this issue, and did not request reconsideration of this suspension. We note, however, that none of the arguments raised by Haynie with respect to his amateur radio operator's license would be sufficient to warrant a modification or dismissal of the Order suspending his GROL.

4. Mr. Haynie's statements urge the Bureaus to review the decision to suspend his amateur operator's license and the proposed revocation of his amateur station license. Mr. Haynie has presented the following arguments in support of his request:

a. That he is not an habitual offender, has no previous record of violations, and is capable of operating under FCC Rules and guidelines.

b. That he realizes the seriousness of the offense for which he was convicted.

c. That the forfeiture imposed and the three year probation period is punishment enough.

d. That since his conviction, he has not violated any FCC Rules, demonstrating that he is capable of adhering to the Rules.

e. That the violation he was convicted of did not occur at his amateur station.

f. That he has properly operated his amateur radio station for over 25 years.

g. That he obtained his license at "an early age", "cherishes it dearly" and will do everything in his power to adhere to the Rules in the future.

h. That revocation of his station license would not be in the best interest of the public because of the role amateur operators can play during times of disaster.

These arguments can be summarized into essentially four arguments, first, that his amateur operator and station licenses should not be suspended because he has had a long history of compliance (almost 25 years), realizes the gravity of the offense and, in the future, will adhere to the Rules. Second, he also argues that the suspension of his amateur operator and station licenses is unnecessary because the forfeiture and three year probationary period is sufficiently punitive. Third, he also argues that since the violation occurred at Mr. Haynie's place of work (a broadcast facility) rather than at his amateur station should weigh against suspension of his amateur station license. Finally, Mr. Haynie argues that suspension of his amateur licenses would not be in the public interest because of the role that amateur operators play during times of disaster.

5. Mr. Haynie's arguments are unpersuasive. In determining whether to revoke Mr. Haynie's amateur station license and whether to affirm the suspension of his amateur operator's license, the Commission is not concerned with whether the licensee has been punished sufficiently for any wrongdoing, but rather, whether the licensee is qualified to remain a licensee. Similarly, it is the nature of the action not the place where it occurred that is critical to the inquiry of whether a person is qualified. Although it is true that Mr. Haynie had no prior history of violating the Act or Commission rules, Petitioner's action of deliberately interfering with a satellite transmission was egregious conduct which reflects adversely upon Mr. Haynie's basic qualifications to be a Commission licensee. *See Henry P. Armstrong*, (FCC 83R-16, Review Board 1983); *Donald E. Gilbeau*, 91 FCC 2d 98 (Rev. Bd. 1982). This is not a case where the licensee inadvertently or negligently caused interference to another service. The record shows that Mr.

Haynie was responsible for maintenance of various components of his employer's earth station, that he is a trained earth station operator and knowledgeable regarding the methods and techniques of sending and receiving signals to and from communications satellites. Further, as the holder of a Commission license, Mr. Haynie is presumed to be fully cognizant of all Commission Rules.

6. Mr. Haynie has asserted that he will comply with the Commission's Rules in the future. This, however, is not persuasive evidence to justify a conclusion that Mr. Haynie is likely to abide by the Rules in the future. Mr. Haynie's reference to the public interest served by licensed amateur operators generally is also insufficient to outweigh the evidence which establishes his lack of the required character qualifications.

7. For the foregoing reasons, the ORDER suspending Thomas M. Haynie's GROL, PG-6-9934, and Amateur Advanced Class Radio Operator's License is AFFIRMED, and the licensee's Amateur Radio Station License, WB4PVK, is REVOKED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-210

In the Matter of

Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods — RM-7974

ORDER EXTENDING COMMENT AND REPLY COMMENT PERIOD

Adopted: November 3, 1992; Released: November 4, 1992

By the Chief, Land Mobile and Microwave Division:

1. On October 13, 1992, the Commission released a Notice of Proposed Rule Making, FCC 92-429, in this proceeding. The specified deadlines for comments and reply comments were November 16, 1992 and December 1, 1992, respectively.

2. The summary of the Notice of Proposed Rule Making was published in the Federal Register on October 29, 1992, 57 Fed Reg 49058 (October 29, 1992). In order to provide adequate notice to commenters in this proceeding, the deadlines for comments and reply comments are hereby extended. Accordingly, based on authority in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. § 0.331, IT IS ORDERED that the deadline for filing comments in the subject Notice of Proposed Rule Making is **November 30, 1992** and the deadline for filing reply comments is **December 15, 1992.**

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements	**CC Docket No. 90-623** **CC Docket No. 88-2, Phase I**

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 1992; Released: November 2, 1992

By the Chief, Common Carrier Bureau:

1. On April 3, 1992, the Southwestern Bell Telephone Company (Southwestern) filed with the Commission a petition for structural relief, pursuant to the *BOC Safeguards Order*,[1] and an explanation of why it had not met Open Network Architecture (ONA) state tariffing requirements for certain services in certain states. We find that Southwestern has adequately demonstrated that a waiver of the state tariffing requirement is appropriate for each of the ONA services in the particular states it identifies. We also find, in view of our grant of this waiver, that Southwestern has made the requisite showing for a grant of its petition for structural relief. Accordingly, we grant Southwestern's petition.

2. The *Computer III* and *BOC Safeguards* Orders require that a Bell Operating Company (BOC) that wishes to provide an enhanced service on an integrated basis before removal of structural separation must submit and obtain approval of a Comparably Efficient Interconnection (CEI) plan.[2] Southwestern currently provides two enhanced services, protocol conversion and voice messaging, pursuant to approved CEI plans.[3]

3. In addition, in the *BOC Safeguards Order*, the Commission concluded that Bell Operating Company (BOC) provision of enhanced services pursuant to nonstructural safeguards would serve the public interest, and established conditions for the removal of the structural separation requirement for BOC provision of enhanced services. Once a BOC concludes that it has met the requirements for structural separation it must demonstrate that it: 1) has federal tariffs in effect for each of its initial interstate ONA services; 2) is technically prepared to offer each of its initial ONA services; and 3) has filed state tariffs for each of its initial ONA intrastate services.[4]

4. In its petition, Southwestern certifies that, with the exception of two services for which it has not filed state tariffs in certain states, it has taken all of the steps specified for initial ONA implementation.[5] Southwestern claims that, due to a lack of demand, its Hot Line and Warm Line Service is available in Texas only via a Special Service Assembly Request (SSAR).[6] Southwestern further states that, also due to a lack of demand, its Customer Alerting basic service element is available in Kansas and Missouri only through an SSAR.[7] Southwestern certifies that any customer in either of these states can request the two services, although the two services may be offered through an SSAR arrangement depending on location.[8]

5. MCI opposes Southwestern's petition and argues that the Commission should not grant structural relief while relying partly on the federal tariffs Southwestern filed for initial ONA services, because the federal tariffsPdo not properly implement ONA goals.[9] MCI further argues that Southwestern's state tariffs provide a weak predicate for structural relief and cites the fact that some states have suspended ONA tariffs pending further review.[10]

6. The American Newspaper Publishers Association (ANPA) also opposes Southwestern's petition. ANPA argues that the three prerequisites to a grant of structural relief ignore the likely competitive harm from entry by the BOCs into the enhanced services marketplace on an integrated basis. Therefore, ANPA argues, the Commission should not grant structural relief until the BOCs are prevented from exploiting their local exchange monopoly in the enhanced services marketplace.[11] ANPA also argues that Southwestern has not met the Commission's requirement that it file state tariffs for intrastate ONA services.[12]

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[1] Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *pets. for recon. pending, pets. for rev. pending*, California v. FCC, No. 92-70083 (9th Cir. filed Feb. 14, 1992).

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations, Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.* 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*) , *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*); *Phase I Order* and *Phase I Reconsideration Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*); *further recon.*, 4 FCC Rcd 5927 (1988) (*Phase II Further Reconsideration Order*); *Phase II Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for recon. pending, pets. for review pending*, California v. FCC, No. 90-70336 (and consolidated cases) (9th Cir. filed July 5, 1990).

[3] SWBT Plan for Comparably Efficient Interconnection for Voice Messaging Services, Memorandum Opinion and Order, 3 FCC Rcd 6912 (1988); SWBT Plan for Comparably Efficient Interconnection of Enhanced Services Providers for Protocol Conversion Services, Memorandum Opinion and Order, 4 FCC Rcd 2236 (1989).

[4] *BOC Safeguards Order*, 6 FCC Rcd at 7624-7625 n.212.

[5] Southwestern Petition at 2.

[6] *Id.* at 2-3.

[7] *Id.* at 3.

[8] Southwestern Reply Comments at 6.

[9] MCI Comments at 1.

[10] *Id.* at 4.

[11] ANPA Comments at 1.

[12] *Id.* at 2-3.

ANPA further argues that the Commission should refrain from granting the petition until the *BOC Safeguards Order* is reviewed by the courts.[13]

7. We conclude that Southwestern has adequately demonstrated that a waiver is appropriate for the two initial intrastate ONA services in the states it identifies, provided that Southwestern complies with conditions to which it stipulated in its filing.[14] We also require that Southwestern clearly indicate in its state tariffs those intrastate ONA services available on SSAR basis and that it file general tariffs for these services as soon as there is sufficient demand. With these conditions, we grant Southwestern a limited waiver of the state tariffing requirement of the *BOC Safeguards Order*.

8. None of the commenters in this proceeding has set forth any new substantive reason why Southwestern's petition should not be granted. Instead, the three commenters disagree with Commission policy on nonstructural safeguards and the effective implementation of ONA. In the *BOC Safeguards Order*, the *BOC ONA* proceeding, and the *Part 69/ONA Order*, the Commission addressed arguments about the appropriateness of lifting the structural separation requirement, the role of state tariffs in the ONA process, and the pricing of interstate ONA services.[15] This order merely implements the Commission's decision to substitute nonstructural safeguards for structural separation; it is not the proper forum for parties to reargue the merits of that Commission decision.

9. We therefore consider whether, in view of our grant of a waiver of the state tariffing requirement for two intrastate ONA services in certain states, Southwestern has made the requisite showing for structural relief. We conclude that it has. First, Southwestern certifies that it is technically prepared to offer each of its initial ONA services consistent with its ONA plan.[16] Second, Southwestern certifies that it has effective federal tariffs for these services. Finally, with our grant of a waiver, Southwestern has satisfied the requirement that it file state tariffs for its initial ONA services. In addition, we see no reason to take the unusual step of delaying our grant of Southwestern's petition, as suggested by ANPA, until the courts have reviewed the *BOC Safeguards Order*. Accordingly, we grant Southwestern's petition.

10. Southwestern must continue to comply with the BOC ONA plan and reporting requirements established in the *BOC Safeguards* and *ONA* proceedings.[17] In the *BOC ONA Further Amendment Order* the Commission required that the BOCs file further amendments and annual reports on their progress in implementing ONA.[18] In addition, in the *BOC Safeguards Order*, the Commission stated that it would review nonstructural safeguards after all of the BOCs have operated under a full ONA environment for three years. [19] We grant Southwestern's petition subject to these ongoing ONA requirements.

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[13] *Id.* at 5.

[14] *See supra* para. 4.

[15] *BOC Safeguards Order*, 6 FCC Rcd at 29-30, 44-55; Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1, 162-171 (1988) (*BOC ONA Order*), *modified on reconsideration*, 5 FCC Rcd 3084 (1990) (*ONA Reconsideration Order*), 5 FCC Rcd 3103, 3112-3113 (1990) (*BOC ONA Amendment Order*), *Erratum*, 5 FCC Rcd at 4045, *pets. for recon. pending, pets. for rev. pending, California v. FCC* No. 90-70336 (9th Cir. filed July 5, 1990; 6 FCC Rcd 7646, 7663-7664 (1991) (*BOC ONA Further Amendment Order*), *pet. for rev. pending, MCI Telecommunications Corp. v. FCC* No. 92-70189, (9th Cir. filed Feb. 19, 1992); *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order*), *pets. for recon. pending*.

[16] In the *Federal Tariff Waiver*, we granted Southwestern temporary waivers of the federal tariffing requirement for Called Number Identification (Called Directory Number Delivery via ISDN Q.931) and Calling Number Identification (Calling Billing Number Delivery via ISDN Q.931) because of software difficulties. The temporary waivers were granted on the condition that Southwestern continues to attempt to resolve its software difficulties and provides the service as soon as possible. *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for ONA; Filing and Review of ONA Plans*, Memorandum Opinion and Order, CC Docket Nos. 89-79 and 88-2, 7 FCC Rcd 811, 816 (1992) (*Federal Tariff Waiver*). In addition, on June 11, 1992, Southwestern requested waivers for two additional services: Traffic Data Accessible by ESPs (Traffic Data Reports) and Loop Status Verification Service (Verify Integrity of Subscriber Lines). Southwestern Petition for Waiver at 2. In the *Second Federal Tariff Waiver*, we granted Southwestern a temporary waiver of Traffic Data Reports, because it plans to introduce a superior form of the service. By March 31, 1993, Southwestern must tariff either Traffic Data Reports or its new proposed replacement service Customer Network Administration. In that order we also granted Southwestern a waiver to substitute Data Over Voice service for Verify Integrity of Subscriber Line on the condition that Southwestern fulfills its commitment to the Alarm Industry Communications Committee. *Second Federal Tariff Waiver*, DA 92-1477 (released October 26, 1992).

[17] In the *BOC ONA Amendment Order*, the Commission required that BOC enhanced services operations must take the same access to certain BOC operations support systems (OSS) that BOCs provide to independent enhanced services providers once structural separation requirements are lifted. 5 FCC Rcd at 3108.Several BOCs have filed petitions for reconsideration and clarification of this requirement. We waive the same-access-to-OSS requirement for Southwestern pending a Commission decision on these petitions.

[18] *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7649-7650, Appendix B.

[19] *BOC Safeguards Order*, 6 FCC Rcd at 7625. On April 17, 1990 Southwestern filed an amendment to its approved Voice Messaging Services (VMS) CEI plan to inform the Commission that it might use a form of separate subsidiary to provide VMS rather than provide it on an integrated basis as originally proposed. Southwestern indicated that it would continue to comply with all the *Computer III* requirements consistent with the requirements of the *Phase I Further Reconsideration Order*, 3 FCC Rcd 1139, para. 33. *See* Pleading Cycle Established for Comments on SWBT's Amendment to its Comparably Efficient Interconnection Plan for the Provision of Voice Messaging Service, 5 FCC Rcd 3529 (1990). Under our *Computer III* safeguards, a BOC may provide enhanced services under a variety of business organizational structures for its enhanced and regulated operations, as long as the BOC complies with the safeguards against discrimination and cross-subsidization established in the *Computer III*, *BOC ONA*, *BOC Safeguards*, and *Joint Cost* proceedings. BOC provision of enhanced services through a different organizational structure does not alter its ability to perform joint marketing of enhanced services either pursuant to

11. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91 and 0.291, a waiver for Southwestern of the initial state tariffing requirement for two intrastate ONA services in certain states IS GRANTED.

12. IT IS FURTHER ORDERED, that Southwestern's Petition for Removal of the Structural Separation Requirement IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

a CEI plan or to nonstructural safeguards, and does not impose on a BOC a requirement to market enhanced services of other ESPs. *See supra* notes 1, 2 & 15; *see also* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions between Telephone Companies and their Affiliates, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298 (1987), *recon.*, 2 FCC Rcd 6283 (1987), *modified on recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.*, Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-254

In the Matter of

Petition for Declaratory Ruling
Concerning Section 312(a)(7)
of the Communications Act

REQUEST FOR COMMENTS

Adopted: October 30, 1992; Released: October 30, 1992

Comment Date: January 22, 1993
Reply Comment Date: February 23, 1993

By the Commission: Commissioner Barrett issuing a separate statement.

1. The Commission has before it an Application for Review, filed by Kaye, Scholer, Fierman, Hays & Handler ("Kaye, Scholer"), of the action taken by the Chief of the Mass Media Bureau in a letter on August 21, 1992 (FCC Ref. 8210-AJZ/MJM), which declined to grant the relief sought in Kaye, Scholer's Petition for Declaratory Ruling of July 29, 1992. In its petition, Kaye, Scholer had requested a declaratory ruling from the Commission with respect to the following:

> whether a broadcaster may, consistent with the "reasonable access" provisions of Section 312(a)(7) of the Communications Act and the "no censorship" provision of Section 315(a) of the Communications Act, "channel" into those hours when there is no reasonable risk of children being in the audience, candidate "uses" that present graphic depictions of dead or aborted and bloodied fetuses or fetal tissue.

Kaye, Scholer Application for Review at 5. In comments filed in response to the Kaye, Scholer Application for Review, another party questioned whether a policy that denies licensees' ability to channel such programming is consistent with the Commission's "adoption and enforcement of children's television programming rules." Comments of Mark Van Loucks in Support of Application for Review at 14. After determining that the specific political advertisement at issue was not indecent under Section 1464, the Bureau concluded that a licensee could not channel the advertisement to the indecency "safe harbor" without running afoul of Sections 312(a)(7) and 315 of the Act.

2. In addition, the Chief of the Mass Media Bureau has issued today, under severe time constraints, a letter ruling in response to a complaint filed on behalf of Daniel Becker, a candidate for Congress in the Ninth District of Georgia, against WAGA-TV, Atlanta. WAGA-TV has refused to air Mr. Becker's 30-minute campaign program "Abortion in America: The Real Story" outside the safe harbor for indecent material because the station argues that to do otherwise would violate 18 U.S.C. §1464. Unlike the political advertisement at issue in the *Kaye, Scholer* ruling, the Bureau has not determined whether "Abortion in America" is or is not indecent under Section 1464 because the program has not yet been broadcast by the station. The Bureau stated that until the Commission provides definitive guidance, it would not be unreasonable for the licensee to rely on a prior informal staff opinion in this area, set forth in the *Letter from Chairman Mark Fowler to Hon. Thomas A. Luken*, dated January 19, 1984, and conclude that Section 312(a)(7) does not require it to air, during hours outside the "safe harbor", material that it reasonably and in good faith believes is indecent.

3. We are convinced that these decisions present extremely difficult questions that would best be resolved with the benefit of full public comment. Thus, we hereby request public comment on the issues raised by the rulings described above. Sepcifically, we seek comment on all issues concerning what, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent. We also seek comment as to whether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children. In this latter respect, we specifically invite commenters to address the proper scope of any such right and the standard by which the Commission should evaluate the reasonableness of broadcasters' judgments rendered in exercising that right.[1]

4. Interested parties may file comments on or before **January 22, 1993,** and reply comments on or before **February 23, 1993.** An original and five copies of all comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Finally, in view of the general nature and broad application fo the policy issues raised herein, we will treat this as a nonrestricted proceeding subject to Section 1.1206(b)(4) of our rules. 47 C.F.R. §1.1206(b)(4).

5. For additional information on this proceeding, contact Milt Gross, Chief of the Political Programming Branch, (202) 632-7586.

[1] Until the Commission acts on the Kaye, Scholer Application for Review, licensees should follow the principles set forth in the Bureau's letter rulings. *See Gillette Communications of Atlanta, Inc. and Kaye, Scholer, Fierman, Hays and Handler*, DA 92-1160 (MMB), released August 21, 1992; and *Letter to Daniel Becker*, DA 92-1503 (MMB), released October 30, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

In Re: Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act

During this current political season, the Commission has faced many tough issues. Last December, we attempted to clarify our political rules.[1] I believe we did a good job of providing more clarity with respect to our political rules. Unfortunately, we could not anticipate each and every possible situation. This lack of clarity exists with respect to five minute or other non-standard program length political advertisements. When faced with that issue, the Commission determined we should receive comment from the public.[2] I agree with that determination.

Similarly, the Commission now faces the issue of abortion political advertisements and programs which in one case depicts two actual abortions and graphic pictures of dead fetuses. I personally would prefer not to see these images broadcast on television to the general public. I particularly have concern about the impact these graphic images might have on children in the broadcast audience. I believe these images could cause far more damage to the psychological well-being of the child audience than any of the programming the Commission to date has found to be indecent.

While I personally object to this type of graphic programming being aired at a time when children could likely be in the audience, I am constrained to follow the statutory dictates of the Communications Act. Section 312 (a) (7) of the Act provides candidates for federal office with a right of "reasonable access." In addition, Section 315 (a) contains a "no censorship" provision that restricts a broadcaster's ability to edit out "objectionable material." The intent of Congress in enacting these provisions was to assure federal candidates the right to broadcast political speech without being subject to the content-based judgments of broadcast station owners. At the same time, 18 U.S.C. Section 1464 prohibits the broadcast of indecent or obscene speech. One goal of this statutory provision is to protect children from this type of speech. Clearly, a conflict exists between these statutory provisions governing political and indecent speech. The full Commission has never ruled on this issue.[3] We should make clear to the candidates, broadcast station owners and the public our ruling with respect to the interrelationships of these provisions. Thus, I support our efforts to seek public comment before we decide these issues.

I look forward to reviewing the comments filed in response to this Public Notice. I am hopeful they will shed light on the intentions of Congress and the Commission's authority to act in this area.

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[1] *See Codification of the Commission's Political Policies*, 7 FCC Rcd 678 (1991).

[2] *See Staff Ruling and Request for Public Comment (NAB Petition for Declaratory Ruling)*, DA 92-1478, adopted October 23, 1992.

[3] As the Public Notice correctly points out, the *Letter from Chairman Mark Fowler to Hon. Thomas A Luken*, dated January 19, 1984 was an informal staff opinion on this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re:
Amateur Radio Station WA4D
Michael E. Whatley
5844 Doris Drive
Alexandria, VA 22311

NAL/Acct. No.: 315HF0001

NOTICE OF APPARENT LIABILITY

Adopted: November 3, 1992; Released: November 5, 1992

By the Field Operations Bureau:

I. INTRODUCTION

1. This Notice of Apparent Liability For Monetary Forfeiture is issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to Michael E. Whatley for willfully and maliciously causing interference to other operations in the amateur radio service in violation of Section 97.101(d) of the Commission's Rules, 47 C.F.R. § 97.101(d), and Section 333 of the Act, 47 U.S.C. § 333.

2. The appropriate amount of forfeiture for this violation is $2,000.

II. BACKGROUND

3. On November 17, 1991, the FCC's monitoring station in Allegan, Michigan, monitored and traced transmissions to Michael E. Whatley's amateur radio station, WA4D. Mr. Whatley deliberately used these signals to interfere with the communications of other amateur operators on 7257 kHz and 7258 kHz. These transmissions continued throughout the period 9:03 a.m. to 9:52 a.m. Mr. Whatley willfully operated on frequencies which he knew were being used and harassed other operators with rude and insulting communications. Mr. Whatley identified himself with his call sign, WA4D ("Willie Able Four Dog"), during his communications. When other operators tried to switch frequencies, Mr. Whatley followed them onto the new frequency and continued to verbally harass them.

III. DISCUSSION

4. According to forfeiture guidelines set out in the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), and Section 503(b)(2) of the Act, 47 U.S.C. § 503(b)(2), the base forfeiture amount for malicious interference in violation of Section 503 is $7,000. Because of the Commission's policy of reducing the amount in forfeitures issued to individuals, and in view of the fact that this is the first forfeiture issued to Mr. Whatley, we are reducing this amount to $2,000. No further adjustments appear warranted.

IV. CONCLUSION

5. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, and Section 1.80(f) of the Rules, 47 C.F.R. § 1.80(f), that Michael E. Whatley is APPARENTLY LIABLE FOR A FORFEITURE of Two Thousand Dollars ($2,000) for willful violation of Section 97.101(d) of the Commission's Rules, 47 C.F.R. § 97.101(d) and Section 333 of the Communications Act, as amended, 47 § U.S.C. § 333.

6. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Rules, 47 C.F.R. § 1.80(f)(3), that Michael E. Whatley shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response specifying facts and circumstances warranting a reduction in the amount of the forfeiture, or discontinuance of forfeiture proceedings. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 6000673-7482

7. Written statements regarding why the forfeiture should not be imposed, or in support of a reduction in the amount of the forfeiture should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division - 1500E3
1919 M Street, N.W.
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Monetary Forfeiture shall be sent by certified mail to Michael E. Whatley, 5844 Doris Drive, Alexandria, VA 22311.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies,
Petitions for Waiver of
Part 69 of the Commission's Rules

Dedicated Network Access Lines,
Open Network Architecture

ORDER

Adopted: October 29, 1992; Released: November 2, 1992

By the Chief, Common Carrier Bureau:

1. In July 1991, the Commission adopted revisions to Part 69 of the Commission's Rules, specifying rate structure and other tariffing requirements to be used by the Bell Operating Companies (BOCs) when implementing the Commission's requirements for Open Network Architecture (ONA).[1] Under the ONA requirements, the BOCs must unbundle various access offerings into Basic Service Elements (BSEs) and Basic Serving Arrangements (BSAs).[2] In addition, the *Part 69 ONA Order* requires the BOCs to offer one lineside and one trunkside switched access BSA. Establishment of additional switched access BSAs require a waiver.[3]

2. On September 14, 1992, Ameritech requested a waiver of Part 69 to establish a 9.6 kilobit per second (kbps) dedicated network access line (DNAL)[4] as a new BSA, and to establish a new subelement in the transport rate element within the switched access category of Part 69 for this BSA. Ameritech Petition at 2.[5] Ameritech also seeks to establish a new subelement in transport in order to assess a termination charge for a 56 kbps DNAL authorized earlier. *Id.*[6] These requests are unopposed.

3. Ameritech states that these new rate elements are necessary to provide four new BSEs. *Id.*[7] Ameritech contends that granting its waiver requests is consistent with prior Bureau orders, and will provide enhanced service providers with the valuable capability to transmit network information directly into Ameritech's network. *Id.* Ameritech argues that the costs of these DNALs should be recovered from the customers using them rather than all switched access users. *Id.*

4. The Bureau has reviewed Ameritech's requests and concludes that establishing separate subelements in these circumstances is consistent with the purposes of the access charge rules. Thus, Ameritech has shown good cause, within the meaning of Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, to create a switched access rate element for the 9.6 kbps DNAL and to establish a DNAL termination rate subelement associated with the 56 kbps DNAL.[8] Both the 56 kbps DNAL and the 9.6 kbps DNAL are BSAs under the ONA framework.

5. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, filed by the Ameritech Operating Companies, to establish subelements in the transport rate element for its 9.6 kbps dedicated network access line and its 56 kbps dedicated network access line channel termination, IS GRANTED.

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[1] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*), *modified on recon.* 7 FCC Rcd 5510 (1992) *other petitions for recon. pending.* The BOCs' ONA plans had been previously approved. *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3103 (1990) (*ONA Amended Plans Order*).

[2] For a discussion of what constitutes a "BSA" and a "BSE," see *Part 69 ONA Order*, 6 FCC Rcd at 4525.

[3] *Part 69 ONA Order*, 6 FCC Rcd at 4527.

[4] A DNAL is a dedicated channel between a customer's premises and a BOC central office that transmits network information or network control information, in this case between an enhanced service provider and that BOC's network. *See* Ameritech Operating Companies, Petition for Waiver of Part 69 of the Commission's Rules, Dedicated Network Access Lines, Open Network Architecture, 7 FCC Rcd 116 (Com.Car.Bur. 1991) (*Ameritech DNAL Order*).

[5] In 1991, the Common Carrier Bureau granted Ameritech permission to establish two other DNALs as BSAs. The first is the Circuit Switch Facility Control DNAL, to be used in combination with the Make Busy Arrangement BSE. The second consists of two subtypes: the Simplified Message Desk Interface (SMDI); and the Simplified Message Desk Interface/Expanded (SMDI/E) DNALs. SMDI is used to deliver Remote Activation of Message Waiting and Call History Package Delivery as BSE services. SMDI/E is a DNAL used to deliver the same BSEs, but makes those BSEs available at any Ameritech end office connected to Ameritech's common channel signalling network. *Ameritech DNAL Order*, 7 FCC Rcd at 116.

[6] On December 30, 1991, the Bureau granted Ameritech a waiver of Part 69 to establish a switched access rate element for its 56 kbps DNAL. *See* Local Exchange Carrier Line Information Database, 7 FCC Rcd 525 (Com.Car.Bur. 1991).

[7] Those BSEs are Coordinate Voice and Data Delivery, Call Redirection, Computer Assisted Call Transfer and Computer Assisted Dialing.

[8] Ameritech has not stated in its waiver petition whether it plans to charge for these DNAL rate elements on a flat monthly basis or a usage-sensitive basis. In the past, the Bureau has granted DNAL waiver requests subject to the outcome of the Commission's transport proceeding. *See* Transport Rate Structure and Pricing, Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 6 FCC Rcd 5341 (1991); Report and Order and Further Notice of Proposed Rulemaking, FCC 92-442 (released October 16, 1992). *See also Ameritech DNAL Order*, 7 FCC Rcd at 117-18 (para. 11-13); Petitions for Waiver of Part 69 of the Commission's Rules, Dedicated Network Access Lines, Open Network Architecture, 7 FCC Rcd 1424, 1425 (para. 6) (Com.Car.Bur. 1992) (*BOC DNAL Waiver Order*); Pacific Bell and Nevada Bell, Petitions for Waiver of Part 69 of the Commission's Rules, Dedicated Network Access Lines, Open Network Architecture, 7 FCC Rcd 1933, 1934 (para. 6) (Com.Car.Bur. 1992) (*Pacific Bell DNAL Waiver Order*). We expect the tariff revisions filed pursuant to this waiver to comply with the Commission's rules adopted in the transport proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 77
F.C.C. No. 36	

ORDER

Adopted: November 3, 1992; Released: November 3, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On October 21, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective November 4, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 36 for AT&T Software Defined Network (SDN) Service International Calling Capability and Global SDN service, excluding Network Remote Access Option III.

2. On October 28, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 77.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 36, Contract Tariff Transmittal No. 77 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 36, Contract Tariff Transmittal No. 77, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 79
F.C.C. No. 37	

ORDER

Adopted: November 3, 1992; Released: November 3, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On October 21, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective November 4, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 37 for AT&T Custom Software Defined Network excluding Network Remote Access Option III, Accunet Spectrum of Digital Services and Local Channel Service.

2. On October 28, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 79.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 37, Contract Tariff Transmittal No. 79 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 37, Contract Tariff Transmittal No. 79, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Nevada Bell

Petition for Waiver of Part 69
of the Commission's Rules

ORDER

Adopted: November 2, 1992; Released: November 3, 1992

By the Chief, Tariff Division:

1. On September 25, 1992, Nevada Bell filed a request that the Commission waive Part 69 of its rules, to enable Nevada Bell to establish three new rate elements to recover the costs associated with its Electronic Listing Access Service (ELAS). Nevada Bell Petition at 1-2. Nevada Bell states that the proposed ELAS would provide customers or customers' end users access to directory listing information without the involvement of a directory assistance operator, and without referencing the printed white pages. *Id.* at 2. The waiver request is unopposed.

2. Nevada Bell asserts that this service would provide access to a database through which users could obtain the telephone numbers and addresses of telephone subscribers in Nevada's service areas by conducting an alphanumeric name search.[1] Customers may obtain access to this service through the public packet switched network or through dedicated access via private line services. The petitioner states that the directory will include approximately 500,000 Nevada Bell telephone subscriber listings, and that listing information from other exchange carriers will be included when agreements with independent carriers can be reached. *Id.* The ELAS customer must provide the necessary software for screen formatting, computer interfacing and populating database access fields. *Id.* at 3.

3. According to Nevada Bell, the rate structure will for ELAS include recurring and non-recurring elements. Usage charges will recover the recurring investment and ongoing operating expenses; a charge will be assessed for each screen of information returned, containing between 0 and 10 directory listings. Non-recurring charges will cover the costs associated with the establishment of service and distribution of user identification codes. *Id.* at 3-4.

4. Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, provides that waiver petitions may be granted if "good cause therefor is shown." We have previously considered similar waiver requests from other local exchange carriers.[2] As Nevada Bell notes, we granted those requests because we found that "although electronic directory assistance serves the same function as operator directory assistance, the costs of this service will differ from those associated with the more traditional directory assistance service." The Bureau has previously stated that "[a] distinct charge to recover the unique costs of electronic directory assistance from only the users of this service would, therefore, be more consistent with the Commission's cost causation policies."[3] There is no material difference between the electronic directory assistance services offered by these carriers and Nevada Bell's Electronic Listing Access Service which is the subject of this waiver request.[4] Thus, good cause exists to permit Nevada Bell to establish separate rate subelements for its Electronic Listing Access Service and, therefore, we grant the waiver.

5. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, filed by the Nevada Bell Telephone Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Nevada Bell states that "search criteria will initially be limited to alphanumeric name searches..." and that the user will have to input, at a minimum, the telephone subscriber's last name, locality and area code. Nevada Bell Petition at 3. We conclude from this statement that Nevada Bell's Electronic Listing Access Service will not include "reverse search" capability, the ability to locate a name in the database by entering the associated telephone number.

[2] *See, e.g.*, US West Communications, Petition for Waiver of Part 69 of the Commission's Rules to Provide Electronic White Pages Service, Order, 5 FCC Rcd 5526 (Com.Car.Bur. 1990); Southwestern Bell Telephone Company, Petition for Waiver of Section 69.4(b) of the Commission's Rules, Order, 5 FCC Rcd 3792 (Com.Car.Bur. 1990) (*Southwestern Bell Order*).

[3] *Southwestern Bell Order*, 5 FCC Rcd at 3793.

[4] Our conclusion applies to the service described by Nevada Bell in this transmittal. We express no opinion as to the proper regulatory status of "reverse search" directory assistance.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning
Rates for Dominant Carriers

ORDER

Adopted: October 29, 1992; Released: October 29, 1992

By the Chief, Common Carrier Bureau:

1. In the *AT&T Price Cap Reconsideration Order*,[1] the Commission indicated the price cap rules did not limit when AT&T could engage in promotional offerings, so long as they were not unlawful, but that they should be excluded from price caps and the price cap index calculations.[2] That Order required AT&T to include with its promotional filings, for illustrative purposes only, the Actual Price Index (API) and Service Band Index (SBI) values that would apply if the promotional offering had been included in price cap regulation. In addition, the Commission directed AT&T to recalculate its price cap indexes to remove the impact of existing promotions, but not past promotions no longer in effect at that time. AT&T appealed the *AT&T Price Cap Reconsideration Order* to the U.S. Court of Appeals for the District of Columbia.

2. On September 8, 1992, the Court of Appeals concluded that the *AT&T Price Cap Reconsideration Order* "is arbitrary and capricious for want of an adequate explanation."[3] The court remanded the proceeding to the Commission for further consideration and said that the Commission should provide an adequate explanation if it decides to sustain the policy to exclude the impact of promotional rates from price cap indexes.[4] This Order establishes an interim filing requirement regarding cost support AT&T files with its price cap tariff transmittals in light of the remand.[5]

3. The price cap program sets limits on the rates AT&T may charge its customers, based upon inflation in the national economy, a productivity improvement target, and certain exogenous factors. For each of its three price cap baskets, AT&T computes a Price Cap Index (PCI) and SBIs. Sections 61.3(v) and (ee) of the Commission's Rules, 47 C.F.R. §§ 61.3(v) and (ee). A proposed AT&T rate change for a service within one of the baskets is required to be accompanied by support information showing the impact on rates, as measured by the API. Sections 61.3(b) and 61.49(a) of the Commission's Rules, 47 C.F.R. §§ 61.3(b) and 61.49(a). The API is then measured against the maximum rate level established by the PCI and the range of rate flexibility established by the SBIs. Filings that are accompanied by support information sufficient to establish compliance with the PCI and SBI limits are accorded streamlined review. Sections 61.49(b) and 1.773(a)(iv) of the Commission's Rules, 47 C.F.R. §§ 61.49(b) and 1.773(a)(iv).

4. Pending Commission action on the remand, and to preserve options for the ultimate resolution of the issue, we require AT&T's price cap tariffs to be filed with two price cap showings. One showing shall reflect the currently effective promotions.[6] The tariff transmittal that implements recasting of the indexes should include the same level of detail as the 1991 filing that recast indexes to exclude promotions in the wake of the *AT&T Price Cap Reconsideration Order*.

5. In addition to a showing of indexes that include promotional activity, AT&T must also file index information that excludes the effect of promotional activity. Both sets of indexes shall be filed with each price cap tariff transmittal, not only with promotional filings. As had been the practice, AT&T must include for each version of indexes the existing values and the values assuming the transmittal becomes effective. This recognizes that the indexes employed in the price cap system are Laspeyres indexes, that are designed as a "chain link" of existing and new prices. The showing of existing and new index values also facilitates Bureau tracking of the indexes. Moreover, maintaining both sets of indexes will permit easy implementation of the Commission's ultimate resolution of the promotions issue, and will create only minimal burden on AT&T.

6. Accordingly, IT IS ORDERED that, upon issuance of the mandate by the Court of Appeals that permits its decision to take effect, AT&T Communications shall file with its price cap tariff transmittals Actual Price Indexes

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[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 665 (1991) (*AT&T Price Cap Reconsideration Order*).

[2] Normal changes to the permanent, general schedules of tariff rates differ from promotional offerings, which typically include temporary rate discounts for selected customers. The original *AT&T Price Order* was silent on the issue of promotions. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket 87-313, Report and Order and Second Further Notice, 4 FCC Rcd 2873 (1989) and Erratum, 4 FCC Rcd 3379 (1989). In the reconsideration order, the Commission specifically concluded: "AT&T may also offer any promotions that are consistent with the requirements of the Act. AT&T may not, however, offer a promotional rate decrease targeted to a subgroup of ratepayers, with a rate increase that all persons taking service under the tariff must pay." *AT&T Price Cap Reconsideration Order*, 6 FCC Rcd at 672 (para. 56).

[3] American Telephone and Telegraph Co. v. FCC, No. 91-1178, slip op. at 9 (D.C. Cir. Sept. 8, 1992) (*Promotions Remand*).

[4] *Id.*

[5] *Id.*

[6] This may require AT&T to recast its current API and SBI levels, which exclude promotional activity. Initially, in recasting its API and SBI levels to include currently effective promotions, we recognize there may be some promotions which AT&T may decide to continue to exclude from price caps for various reasons, including lack of adequate data to recast the indexes. We therefore do not mandate that all currently effective promotions be included in this initial recasting of API and SBI levels.

and Service Band Indexes that include its promotional offerings and a set of illustrative indexes that excludes its promotional offerings.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 5, 1992

SELF-EFFECTUATING PROVISIONS OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (the 1992 Cable Act) became law. The purpose of this Public Notice is to inform the public of provisions in the new Act that require no Commission action before taking effect 60 days after the new law's enactment, December 4, 1992. Other provisions of the 1992 Cable Act will not become effective until after the Commission completes rulemaking proceedings. The rulemaking proceedings may, in some instances, clarify the self-effectuating provisions of the 1992 Cable Act described below (*e.g.*, definition of qualified noncommercial educational station under Section 5).

This Public Notice is intended only to provide general guidance. Careful and detailed review of the 1992 Cable Act itself should be undertaken to ensure compliance with all of the Act's new provisions.

Carriage of Noncommercial Stations

Section 5 of the 1992 Cable Act adds a new Section 615 to the Communications Act that requires each cable operator of a cable system to carry the signals of qualified local noncommercial educational television stations requesting carriage.[1] The number of qualified local noncommercial educational television stations required to be carried under this section varies depending upon the number of channels on the system. This provision also requires all cable operators to continue carriage of all qualified noncommercial educational television stations whose signals were carried on their systems as of March 29, 1990, although this requirement may be waived upon the written consent of the operator and the station. A qualified local noncommercial educational television station whose signal is carried by a cable operator under this Section no longer can assert network nonduplication rights to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that operator. Section 5 also enumerates a number of specific technical and other requirements (*e.g.*, channel positioning) that apply to the carriage of these noncommercial educational television stations. Any complaints regarding a cable operator's implementation of these carriage requirements may be filed with the Commission.

Award of Franchises

Section 7 of the 1992 Cable Act amends Section 621 of the Communications Act to prohibit a franchising authority from granting an exclusive franchise and from "unreasonably refus[ing] to award" an additional competitive franchise. If an applicant is denied a second franchise, it may appeal that decision in federal district court or in any state court of general jurisdiction. Section 7 also sets forth specific guidelines for awarding franchises. Local or municipal authorities that are affiliated with franchising authorities also are permitted to operate their own multichannel video programming distributor in the franchise area.

Leased Commercial Access

Section 9(c) of the 1992 Cable Act amends Section 612 of the Communications Act to permit a cable operator required to provide commercial leased access channels to use up to 33 percent of those channels for programming from a "qualified minority programming source" or from any "qualified educational programming source."

Children's Protection from Indecent Programming on Leased Access Channels

Section 10(a) of the 1992 Cable Act amends Section 612 of the Communications Act to permit a cable operator to establish and enforce prospectively a written, published policy[2] of prohibiting programming on leased access channels that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards. Section 10(d) amends Section 638 of the Communications Act to remove cable operators' prior immunity from lawsuit where programming carried on leased access channels or channels designated for public, educational or governmental use involves "obscene material."

Cross-Ownership Limitations

Section 11(a) of the 1992 Cable Act amends Section 613 of the Communications Act to prohibit a cable operator from holding a license in the multichannel multipoint distribution service (MMDS) or from offering satellite master antenna television (SMATV) service in any portion of the area served by the cable operator's system. The Commission is required to waive this prohibition for all existing MMDS and SMATV services owned by a cable operator on October 5, 1992. The Commission is also permitted to waive the prohibition if the Commission determines that waiver "is necessary to ensure that all significant portions of a franchise area are able to obtain video programming."

Section 11(b) also clarifies that a State or franchising authority can prohibit the ownership or control of a cable system in a jurisdiction by any person because of that person's ownership or control of any other cable system in that jurisdiction or where it is determined that acquisition of the cable system may eliminate or reduce competition in the delivery of cable service in that jurisdiction.

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[1] The separate requirement that each cable operator provide carriage to local commercial television stations and qualified low power stations does not take effect until the Commission concludes a rulemaking proceeding implementing commercial carriage requirements.

[2] For purposes of this section, a cable operator's policy will be considered to have been "published" if it is placed in the operator's public inspection file.

Sales of Cable Systems

Section 13 of the 1992 Cable Act adds a new Section 617 to the Communications Act which generally prohibits a cable operator from selling or otherwise transferring ownership in a cable system within a 36 month period following the acquisition or initial construction of the system. Waivers of the three-year holding period may be granted by the Commission where consistent with the public interest and where, if required, the franchise authority approves a transfer. The Commission is required to waive the requirement and to permit appropriate transfers in cases of default, foreclosure, or other financial distress.

If a franchise requires franchising authority approval of a sale or transfer of a cable system, any request for sale or transfer after the 36 month holding period must be acted on by the franchising authority within 120 days.

Notice to Cable Subscribers of Unsolicited Sexually Explicit Programs

Section 15 of the 1992 Cable Act amends Section 624 of the Communications Act to require a cable operator providing a premium channel (defined as "any pay service offered on a per channel or per program basis, which offers movies rated by the Motion Picture Association of America as X, NC-17, or R") as part of a cable subscriber promotional effort, to notify subscribers 30 days in advance: that the cable operator plans to provide a premium channel without charge, when the channel will be offered, and that cable subscribers have a right to request that the channel carrying the premium channel be blocked. The cable operator must block the channel upon the request of a subscriber.

Programming Changes

Section 16(c) of the 1992 Cable Act amends Section 624 of the Communications Act to permit a franchising authority to require a cable operator "to provide 30 days' advance written notice of any change in channel assignment or in the video programming service provided over such channel [and to] inform subscribers, via written notice, that comments on programming and channel position changes are being recorded by a designated office of the franchising authority."

Franchise Renewal

Section 18 of the 1992 Cable Act amends Section 626 of the Communications Act to provide that if a cable operator submits in a timely manner a written renewal notice requesting commencement of a proceeding to identify future cable-related community needs and interests and to review the performance of the current cable operator under the franchise, the franchising authority must commence that proceeding within six months of such notice. Section 18 also amends Section 626 to provide that a franchise revocation proceeding will not be negated by the subsequent initiation of renewal proceedings by a cable operator.

Customer Privacy Rights

Section 20 of the 1992 Cable Act amends Section 631 of the Communications Act to require cable operators to take such actions as necessary to prevent unauthorized access to personally identifiable information concerning any subscriber.

Theft of Cable Service

Section 21 of the 1992 Cable Act amends Section 633 of the Communications Act to increase penalties for willful unauthorized reception of any communication service offered over a cable system for purposes of commercial advantage or private financial gain. The penalties for a first offense are raised to $50,000 or 2 years in prison, or both, and for subsequent offenses to $100,000 or 5 years in prison, or both. In addition, unauthorized reception by each separate device is deemed a separate violation.

Judicial Review

Section 23 of the 1992 Cable Act amends Section 635 of the Communications Act to provide that any civil actionchallenging the constitutionality of the commercial and noncommercial must carry provisions (Sections 4 and 5 of the 1992 Cable Act, which amend Sections 614 and 615 of the Communications Act) will be heard by a three-judge panel of a district court and will be reviewable as a matter of right by direct appeal to the Supreme Court.

Limitation on Franchising Authority Liability

Section 24 of the 1992 Cable Act adds a new Section 635A to the Communications Act which limits to injunctive or declaratory relief the types of relief available in certain lawsuits against a franchising authority or other governmental entity involving regulation or franchising of cable service.

Direct Broadcast Satellite Service Obligations

Section 25(b) of the 1992 Cable Act adds a new Section 335 to the Communications Act directing the Commission to require direct broadcast satellite service providers of video programming to reserve between four and seven percent of their channel capacity exclusively for noncommercial programming of an educational or informational nature as a condition of any provision of service, initial authorization, or authorization renewal.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: November 9, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. C. J. Jones, President 8210-AJZ
Jones Eastern of the Outer Banks, Inc.
Licensee, Station WRSF(FM)
One Carriage Lane, #C-100
Charleston, South Carolina 29401

Dear Mr. Jones:

This letter constitutes a NOTICE OF APPARENT LIABILITY for FORFEITURE to Jones Eastern of the Outer Banks, Inc., licensee of Radio Station WRSF(FM), Columbia, North Carolina, pursuant to Section 503(b) of the Communications Act of 1934, as amended, for your apparent willful continuing violation of Section 73.1125 of the Commission's Rules, in the amount of $20,000.

On September 25, 1987, Jones Eastern of the Outer Banks, Inc., ("Jones Eastern") requested a modification of its facilities to relocate its main studio outside the station's principal community contour to the site of its auxiliary studio in Nags Head, North Carolina. Jones Eastern said the new site was 35 air miles (51 miles by road) from the community of license. The staff found it was three miles outside the authorized 3.16 mV/m contour. In support of its modification request, Jones Eastern indicated that the new site would be easily accessible to Columbia residents; enable the station to attract a broader sample of guests for public affairs shows; allow WRSF to compete better in the market; and, not diminish the current level of service to Columbia. Jones Eastern also represented that it would establish a toll free phone number and continue to maintain the station's public file in Columbia. On January 13, 1989, the Mass Media Bureau denied Jones Eastern's modification request, because the licensee's purported justifications were insufficient to establish that the public interest would be served better than if the station adhered to the main studio rule.

On July 3, 1989, the Bureau received a confidential complaint, contending that Jones Eastern was operating WRSF in violation of Section 73.1125(a) of the Commission's Rules. The complaint stated that WRSF was operating its main studio in Nags Head, despite the Bureau's denial of the station's request to relocate its main studio to Nags Head seven months earlier. According to the complainant, WRSF had been operating its main studio from Nags Head prior to the Bureau's denial of its modification request, and only made the request when it realized it was in violation of the rule. On July 21, 1989, the Bureau sent a letter of inquiry to Jones Eastern, requesting information about the station's equipment and staffing at its main studio in Columbia. Specifically, the Bureau requested a list of the production and transmission equipment maintained in fully operable condition at the Columbia studio as well as a list of all WRSF personnel who report for duty at the Columbia studio location, their job titles, a description of their duties, and a schedule of weekly duty hours for each.

In response to the Bureau's letter of inquiry, Jones Eastern provided the requisite list of fully operable equipment available for transmission and production at any time, adding that programming is produced at the Columbia studio on an "as needed" basis. Jones Eastern also described its "meaningful staff presence" as composed of "three full-time employees": One full-time office manager who works at the studio from 8 a.m. to 5 p.m. Monday through Friday, handling phone calls from Columbia residents; and a business manager and senior account executive who are Columbia residents and "spend time" at the studio. In attempting to demonstrate WRSF's commitment to serve the needs and interests of Columbia, Jones Eastern also submitted samples of forms used by the office manager in conducting a telephone survey of 125 Columbia residents. According to the licensee, the forms would be used in connection with the production of weekly public affairs programs.

In an October 27, 1989, ruling, the Bureau found WRSF's equipment in compliance with Section 73.1125, but its staffing inadequate under the "meaningful management and staff presence" requirement of the rule, as enunciated in *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024 (1988). The Bureau rejected the licensee's characterization of the one full-time employee as an "office manager," finding her to be a receptionist who answers phones and fills out an occasional telephone questionnaire. With respect to the management personnel, the Bureau found that they did not constitute a "meaningful" presence. Accordingly, the Bureau directed the licensee to take the necessary steps to assure a meaningful management and staff presence at the station's Columbia studio, and to submit a progress report within thirty days.

In lieu of a progress report, Jones Eastern filed an application for review, requesting the Commission to reverse the Bureau's determination that its Columbia facility is not in compliance with the main studio rule. It requested that, in the event its application for review were denied, the Commission issue a declaratory ruling outlining the precise number of staff persons and work hours that constitute a "meaningful management and staff presence" at the main studio. Jones Eastern argued that its office manager was supervised regularly by the two management personnel, and that all three are fully accessible to Columbia residents and take an active role in ascertaining their needs and interests. Jones Eastern again referred to the recent telephone survey conducted by its office manager, and appended a representative sample of the station's 1989 quarterly issues/programs list to show that these ascertainment efforts achieved the Commission's community service objectives.

Jones Eastern also clarified the number of hours the management personnel spent at the Columbia facility, to wit: Four (unspecified) hours per week for the business manager, who met twice weekly with the office manager to discuss issues of concern to local residents, made himself available to local residents and community leaders, participated in local civic activities and reported to the general manager about those activities; and two (unspecified) hours per week for the general manager, who also made himself available to and conversed with Columbia residents and community leaders about local civic activities and issues of concern. Although not providing specific hours or

amounts of time for the senior account executive, the licensee asserted that he reported to station management on activities in Columbia. Jones Eastern deemed this a "regular, ongoing management presence" sufficient under the main studio rule.

In denying the application for review, we found that occasional oversight by managers with no regular hours did not constitute a "meaningful management presence" at the main studio, and ordered Jones Eastern to bring its staffing up to a full-time level and submit a report outlining its progress. *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991). Specifically, we ruled that, in order to be considered "meaningful," there must be management and staff presence on a full-time basis during normal business hours. *Id.* at 3616 n.2. Once again, in lieu of a progress report, Jones Eastern filed a "Petition for Reconsideration and/or Clarification" requesting approval of a new staffing proposal (yet to be implemented) and clarification on specific staffing questions. Although we have approved Jones Eastern's new proposal, and granted the petition for clarification, we have denied the petition for reconsideration, as it does not reflect newly discovered facts or changed circumstances under Section 1.106(b)(2)(i) of the Commission's Rules.

Notwithstanding a Commission determination that Jones Eastern's present staffing is inadequate, Jones Eastern has failed to make any changes in its staffing arrangement, including implementation of its new staffing proposal. Jones Eastern also has not requested a stay of the enforcement of the main studio rule against WRSF in any of the pleadings it has filed in the past two years. Rather, Jones Eastern has remained in violation of the rule since at least October 27, 1989, the date the Mass Media Bureau determined that Jones Eastern was in violation of the rule.

In conclusion, it appears that from at least October 27, 1989,[1] to the present, station WRSF violated Section 73.1125(a) of the Commission's Rules. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Jones Eastern of the Outer Banks, Inc., licensee of station WRSF, is hereby advised of its apparent liability for a forfeiture in the amount of twenty thousand dollars ($20,000) for its apparent willful and repeated violation of Section 73.1125(a) on the dates set forth above. The amount was determined by using the criteria set forth in the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), and Section 503(b) of the Communications Act. Under that *Policy Statement*, the base amount for a Section 73.1125 violation is $10,000. In this case, the licensee did not seek to have enforcement of that section stayed. Rather, it remained in continuous violation for two years after it was ordered by the Commission to comply with the rule, and it did not implement any changes in its staffing arrangement, including implementing its new staffing proposal. We consider this to be both repeated and intentional. We also believe that the licensee's staffing at the main studio represented an egregious violation of the main studio rule. Furthermore, this violation appears to have resulted in substantial economic gain for the licensee through the evasion of costs required to comply with the rule. Therefore, we believe it appropriate to increase the forfeiture amount to $20,000. In reaching this amount, careful consideration was also given to the factors set forth in Section 503(b)(2) of the Communications Act.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent. 47 C.F.R. § 1.80(f)(3).

Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

The Commission adopted this letter on October 13, 1992.

BY DIRECTION OF THE COMMISSION*

Donna R. Searcy
Secretary

*Commissioner Quello dissenting and issuing a statement.

[1] Although this reflects the actual date on which the Mass Media Bureau determined that Jones Eastern was in noncompliance with the rule, the complainant alleged that WRSF had been treating its Nags Head studio as its "main studio" even before its 1987 modification request. In any event, the two-year period WRSF has been in known violation of the main studio rule is well within the statute of limitations set out in Section 503(b)(6)(A)(ii) of the Communications Act, as WRSF's 1988 renewal application (BRH-880729YE) is still pending.

Dissenting Statement of Commissioner James H. Quello

Notice of Apparent Liability to Jones Eastern of the Outer Banks, Inc., Licensee, WRSF(FM). (Letter Adopted by the Commission)

I agree with the Commission's decision to issue a Notice of Apparent Liability because of the apparent violation of the main studio rule by WRSF(FM). But I cannot agree that the fine should be multiplied pursuant to the Commission's *Policy Statement on Standards for Assessing Forfeitures*, 6 FCC Rcd. 4695 (1991).

In the first place, I continue to believe that the forfeiture guidelines contribute to the type of "regulatory overkill" that was practiced in this case. *See Standards for Assessing Forfeitures*, 7 FCC Rcd. 5339, 5347 (1992) (Commissioner Quello, dissenting). More specifically, however, it seems bad form for the Commission to double the fine while simultaneously granting the licensee's petition for clarification of the rule, apparently agreeing that the requirement of a "meaningful management and staff presence" was not adequately defined. *See Jones Eastern of the Outer Banks, Inc.*, FCC 92-426 (released October 14, 1992).

I respectfully dissent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

fONOROLA Corporation File No. I-T-C-91-103

Application for Authority
Under Section 214 of the
Communications Act to Resell
Facilities of Other Common
Carriers to Provide Domestic
Carriers Interconnection
with Canadian Carriers.

and

EMI Communications Corporation File No. I-T-C-91-050

Application for a Certificate
of Public Convenience and
Necessity Pursuant to
Section 214 of the Communications
Act as amended, to Provide
International Communications
Service between the United States
and Canada on a Resale Basis.

MEMORANDUM OPINION, ORDER AND CERTIFICATION

Adopted: October 8, 1992; Released: November 4, 1992

By the Commission: Commissioner Quello concurring in result.

I. INTRODUCTION

1. The Commission has before it the above-captioned applications from fONOROLA Corporation (fONOROLA) and EMI Communications Corporation[1] (EMI) seeking authorization, pursuant to Section 214 of the Communications Act of 1934 (the Act), as amended, 47 U.S.C. § 214, to resell international private line and switched services between the United States and Canada. Pursuant to our *International Resale Order*,[2] we require applicants seeking to resell international private line services to demonstrate that equivalent resale opportunities exist in the country at the other end of the private line. The applications before us request that we make the determination that Canada affords the requisite equivalency of resale opportunities. Based upon the evidence submitted in the record, we find that such equivalent resale opportunities exist in Canada for resellers seeking to provide service between the United States and Canada. We accordingly grant fONOROLA and EMI authorization to provide their requested services, subject to the conditions set forth below.

II. BACKGROUND

2. In the *International Resale Order*, we found that a policy encouraging the resale of international telecommunications services would further the public interest in cost-based international telecommunications and more efficient use of international facilities. Specifically, we concluded that a more liberal policy toward the resale of international private lines to provide switched voice services would allow new entrants in the market and exert a downward pressure on above-cost international accounting rates and overseas collection rates through the diversion of switched traffic to resold private lines.[3] We therefore authorized the resale of international private lines to any country that offered equivalent resale opportunities.

3. At the same, however, we concluded that permitting "one-way resale", *i.e.*, resale only from the overseas point inbound to the United States, would have the undesirable effect of undermining the goals and benefits of our new policy. Such "one-way resale" could enable foreign carriers or administrations unilaterally to divert U.S. inbound switched traffic, for which U.S. carriers normally receive settlements payments under the international settlements policy,[4] to private lines, thereby evading the settlements process for that traffic.[5] By contrast, absent the opportunity to resell private lines in the reverse direction from the U.S. to the foreign country, U.S. carriers would necessarily con-

[1] On May 1, 1992 Eastern Microwave, Inc. changed its name to EMI Communications Corporation.

[2] In the Matter of the Regulation of International Accounting Rates Proceeding, Phase II, First Report and Order, (*International Resale Order*), 7 FCC Rcd 559 (1991) *recon. pending.*

[3] *See International Resale Order* at 560.

[4] The International Settlements Policy (ISP) requires uniform settlement rates, accounting rates and division of tolls for U.S. international carriers on parallel routes. The aim of the ISP is to prevent foreign telecommunications administrations from "whipsawing" U.S. carriers, or playing carriers off against each other to the disadvantage of the U.S. carriers and U.S. ratepayers. *See Mackay Radio and Telegraph Company, Inc.*, 2 FCC 392 (1936), *aff'd by the Commission en banc*, 4 FCC 150 (1937), *aff'd sub nom. Mackay Radio and Telegraph Co. v. F.C.C.*, 97 F.2d 641 (D.C. Cir. 1938).

[5] This would occur because a foreign-based resale carrier could lease both the foreign and U.S. halves of an international private line and use that line to carry inbound traffic into the United States and hand it off to a domestic U.S. carrier through a connection to the U.S. public switched telephone network (PSTN). Although the Commission's rules do not explicitly subject international private line resale to the Commission's ISP, we note that on February 5, 1990, AT&T filed a petition for declaratory ruling seeking, *inter alia*, a Commission determination that U.S.-based carriers must comply with the Commission's ISP when providing an "IMTS option" over an international private line. *See* AT&T Petition for Expedited Declaratory Ruling, CC Docket 86-494 (February 5, 1990). This petition is still pending.

tinue to route outbound traffic over switched lines, thus continuing to pay above-cost international accounting rates subject to the ISP. Permitting such unilateral evasion of the settlements process would not only exacerbate the U.S. settlements deficit, it would also fail to put downward pressure on international accounting rates and overseas collection rates, thereby frustrating the policy goals behind the encouragement of international private line resale. Accordingly, we authorized resale only to countries that allow resale to occur in both directions so that the benefits of resale would inure to both U.S. and foreign ratepayers. We therefore required that each applicant seeking to resell international private lines demonstrate that the subject foreign country affords resale opportunities equivalent to those available under U.S. law.[6] To comply with Section 63.01(k)(5) of our Rules, both applicants filed amended applications seeking to show that equivalent resale opportunities exist in Canada.

4. fONOROLA is a corporation chartered in the United States seeking authorization to become an international common carrier providing U.S. - Canada service by reselling the services of authorized facilities-based international common carriers. fONOROLA proposes to lease private lines from U.S carriers and to use them for the provision of international message telephone service (IMTS), facsimile and data services, on a resale basis.[7] To this end, fONOROLA seeks to offer U.S. domestic common carriers access to Canadian carriers at border crossing points and Canadian carriers access to U.S. carriers' points of presence (POPs). As fONOROLA is wholly-owned by fONOROLA, Inc., a Canadian telecommunications entity, it is a foreign-owned carrier under the Commission's decision in *International Competitive Carrier*,[8] and, thus, would be regulated as dominant in its provision of international common carrier services between the United States and Canada.

5. EMI, a nondominant, U.S.-owned common carrier, is authorized to provide non-IMTS video and associated audio services between the U.S. and Canada. EMI seeks authority to resell international private lines leased from U.S. and Canadian carriers for the provision of 800 service to Canada.[9] EMI also seeks authority to provide international switched voice, facsimile and data services by reselling the international switched voice service set forth in AT&T's Tariff FCC Nos. 1 and 2, U.S. Sprint's Tariff FCC Nos. 1 and 2 and MCI's Tariff FCC No. 1 between the U.S. and all international points listed in those tariffs.

6. We placed the above-captioned applications on public notice on May 1, 1991, and January 25, 1991, respectively, and received no comments. The amended applications which both fONOROLA and EMI filed to meet the requirements of the *International Resale Order* were placed on public notice in April 1992. American Telephone and Telegraph (AT&T) initially filed Comments on fONOROLA's amended application, but subsequently opposed both the fONOROLA and EMI amended applications.[10]

III. DISCUSSION

7. The fONOROLA and EMI applications present the first occasion for this Commission, pursuant to the *International Resale Order*, to determine whether there are equivalent private line resale opportunities for U.S.-based carriers in a foreign country.[11] In the *International Resale Order*, we declined to adopt specific criteria for determin-

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[6] Section 63.01(k)(5) provides, in pertinent part:

> "... If proposed facilities are to be acquired through the resale of private lines for the purpose of providing international services, applicant shall demonstrate for each country to which it seeks to provide service that that country affords resale opportunities equivalent to those available under U.S. law. ..."

[7] Specifically, fONOROLA seeks to lease 54 DS-1 circuits from Canada to the United States and 2 DS-1 circuits from the United States to Canada, pursuant to AT&T Tariffs F.C.C. Nos. 9 and 11, Sprint Tariffs F.C.C. Nos. 5 and 7 and MCI/Western Union International Tariff F.C.C. No. 27.

[8] 102 FCC 2d 812, 842 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986). On October 8, 1992, the Commission adopted a proposal to modify its current policy of treating foreign-owned U.S. common carriers as dominant in their provision of all international services to all foreign markets in favor of a policy that regulates all U.S. international carriers, whether U.S.- or foreign-owned, as dominant only on those routes where their foreign affiliate has the ability to discriminate against unaffiliated U.S. international carriers in the provision of access to bottleneck facilities and services. *See Regulation of International Common Carrier Services*, CC Docket 91-360, Report and Order, FCC 92-_____, adopted October 8, 1992. However, the Order will not become effective until 90 days after publication in the Federal Register. Under procedures specified in that Order, fONOROLA may seek to modify its dominant regulatory status on the U.S.-Canada route.

[9] EMI proposes to provide this service via four T-1s leased from Qwest Microwave VII, Inc., an authorized common carrier (*see* File No. I-T-C-90-186, granted September 6, 1990) and one DS-1 leased from Unitel, a Canadian carrier. These leased lines will be used in conjunction with EMI's own domestic facilities in the U.S.

[10] AT&T filed Petitions to Deny the amended applications of both fONOROLA and EMI, to which both applicants filed Oppositions. EMI also filed a Motion to Supplement. AT&T then replied to both Oppositions and EMI's Motion. Subsequently, the Canadian Embassy and Sprint Communications Company, L.P.(Sprint) submitted *ex parte* letter filings in support of the fONOROLA application (Letter to Chairman Alfred C. Sikes, Federal Communications Commission from Marc A. Brault, Charge d'Affaires, Canadian Embassy, dated August 20, 1992)(Letter to Donna R. Searcy, Secretary, Federal Communications Commission from Michael B. Fingerhut, General Attorney, Sprint, dated September 11, 1992). AT&T's Petition to Deny the fONOROLA application was filed after the due date, along with a request to accept this late-filed petition. We grant AT&T's request because fONOROLA's application and AT&T's petition raise new and novel issues which require a full and complete record, and we find that the public interest would be served by accepting AT&T's petition, along with the applicant's responses, into the record.

[11] The requirement for equivalent resale opportunities to exist between the United States and Canada does not implicate the 1988 U.S.-Canada Free Trade Area agreement (CFTA) or the recently concluded North American Free Trade Area agreement (NAFTA). Provision of telecommunications services through resale is a form of "basic" service. The CFTA does not apply to the provision of basic services. Under the NAFTA, the three governments -- Mexico, Canada and the United States -- took reservations that amount to an exclusion of basic services from the trade principles of the NAFTA.

ing whether equivalency exists in a particular foreign country. We stated that licensing, tariffing and other terms and conditions which may be associated with the provision of service would be among the factors a party might wish to address in trying to show equivalency.[12] However, we did indicate that for equivalency to exist the subject foreign country must, at a minimum, permit open entry for, and nondiscriminatory treatment of, U.S.-based carriers. Indeed, we emphasized that the prices, terms and conditions afforded U.S.-based resellers should be equivalent to those made available to foreign-based resellers providing service in their country.[13]

8. Pursuant to Section 63.01(k)(5) of our Rules, the applicants each submitted information and documentation intended to show that equivalent resale opportunities exist in Canada. As a threshold issue, AT&T asserts that neither applicant has addressed the factors necessary to demonstrate equivalent resale opportunities under Section 63.01(k)(5).[14] The applicants' submissions address equivalency in Canada in terms of open entry, nondiscriminatory treatment in the application of general tariffs and contribution charges, and the ability to interconnect to the public switched telephone network (PSTN) at both ends. The applicants claim these factors are sufficient to demonstrate that overall Canada affords U.S.-based carriers resale opportunities equivalent to those available under U.S. law, as required by our *International Resale Order*. They argue that requiring point-by-point equivalency as AT&T suggests, rather than a broad equivalency, would result in no determinations of equivalency, thereby denying the public the significant benefits associated with international resale. Upon review, we find that the applicants have satisfied the showing required in Section 63.01(k)(5).

9. The applicants first claim that an open and competitive resale market already exists in Canada. They argue that the various decisions[15] issued by the Canadian Radio-television and Telecommunications Commission (CRTC) which collectively describe the regulatory regime applied to resellers in Canada demonstrate that Canada has a policy of open entry for resellers. As additional evidence, fONOROLA submits an outline of this regime provided by the Office of the Secretary General of CRTC.[16] These documents indicate that CRTC requires resellers -- whether Canadian or foreign-owned -- to register with the CRTC and the underlying carrier prior to beginning service,[17] file tariffs,[18] and pay contribution charges for interconnecting circuits to the PSTN.[19] The applicants assert that these regulatory procedures have not proved to be a barrier to entry in the Canadian resale market. In fact, fONOROLA notes that there are approximately 80 resellers operating in Canada, 10 of which are U.S.-based resellers.[20]

10. As additional evidence that Canada allows U.S.-based carriers open and nondiscriminatory entry, the applicants cite CRTC Decision 91-21 in which it is stated that Canadian government policy applies no ownership restrictions on persons acting as resellers in Canada.[21] Therefore, U.S.-based carriers have the same opportunity to enter the Canadian resale market as Canadian carriers. AT&T notes, however, that the draft Telecommunications Act, now pending in Parliament, would impose foreign ownership restrictions on common carriers.[22] Although we share AT&T's concern that the draft Telecommunications Act may impose foreign ownership restrictions on resellers, it is

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[12] *International Resale Order* at 562.

[13] *Id.*

[14] Although our review of each application is on a case-by-case basis, the substance of AT&T's petitions relates to the common issue of equivalency for Canada. Thus, we consolidate our discussion of the issue of equivalent resale' opportunities and AT&T's related arguments.

[15] The relevant CRTC Decisions which have progressively liberalized the Canadian resale market are *Resale and Sharing of Private Line Services*, Telecom Decision 90-3 (1990)(CRTC Decision 90-3); *Teleglobe Canada Inc. - Regulation after the Transitional Period*, Telecom Decision 91-21 (1991)(CRTC Decision 91-21); *Application of TWU - Status of Resellers Under the Railway Act*, Telecom Decision 92-11 (1992) (CRTC *Reseller Status Order)*; and *Competition in the Provision of Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues*, Telecom Decision 92-12 (1992) (CRTC *Competition Order)*. The recent CRTC *Competition Order* not only further liberalized Canada's resale policy, it also extended the geographic scope of permitted resale to encompass approximately 90 percent of telecommunications traffic in Canada. While resellers can originate traffic in 90% of Canada, they can terminate traffic throughout all of Canada. *See* fONOROLA, *ex parte* filing of September 15, 1992. As this liberalized resale policy now applies to the provinces giving rise to approximately 90 percent of Canadian traffic and also allows terminating capability throughout Canada, we believe this constitutes an adequate basis for making an equivalency finding.

[16] Letter to Jan Peeters, President, fONOROLA from R. Chisholm for A.J. Darling, Secretary General, CRTC (June 16, 1992). *See* fONOROLA's Opposition, Attachment.

[17] *See* fONOROLA Application at 4. fONOROLA specifically asserts that registration for a reseller in Canada consists solely of an approximate one-week notification process, as compared to the U.S. requirement that resellers file an application for a Section 214 authorization which must be placed on thirty-day public notice. *See* fONOROLA *ex parte* filing of September 15, 1992.

[18] Recently, CRTC determined that resellers engaged in providing interprovincial service and in control of routing are "companies" under the Canadian Railways Act and thus fall within its jurisdiction; as an immediate result, such resellers are required to file tariffs by October 9, 1992. *See* CRTC *Reseller Status Order, supra* at note 15. We also note that CRTC has adopted a new tariff approval procedure which will permit approval on same day as filed.

[19] *See* CRTC Decision 90-3. Contribution charges, which are the rough equivalent of access charges in the United States, are not applied to data services; WATS or 800 services; local voice, non-interconnected interexchange voice, and dedicated interconnected interexchange voice services; and private lines for private line services. *See* CRTC *Competition Order*, at note 15. In addition to contribution charges, AT&T claims that there are separate "access charges" applicable to resellers providing service between the United States and Canada; however, the CRTC *Competition Order* indicates that no such additional charges apply.

[20] *See* fONOROLA *ex parte* filing of September 15, 1992.

[21] *See* CRTC Decision 91-21, at note 15.

[22] Telecommunications Bill C-62 (draft of February 27, 1992). The draft is unclear as to whether and under what circumstances those restrictions might be applied to resellers. However, we note that Bill C-62's definition of transmission facility, to which Canadian foreign ownership restrictions do apply, is intended to exclude switching apparatus. *See* Letter from Michael Helm, Director General of Telecommunications Policy, Department of Communications to Astrid Pregel, Canadian Embassy, dated September 28, 1992.

premature to speculate on the outcome of the Parliamentary debate on this legislation. However, authorizations granted pursuant to an equivalency finding are subject to the condition of possible modification or revocation if, upon review, we determine at a future date that equivalent resale opportunities no longer exist in Canada.

11. In addition to flagging the foreign ownership question, AT&T asserts that the CRTC *Competition Order*, while a liberalizing step for the Canadianhresale market, does not address certain other concerns[23] that may create further hindrances to equivalent resale opportunities being available in Canada. AT&T specifically expresses concern that the Canadian policy of a 20 percent foreign ownership restriction for facilities-based carriers may apply to the CRTC's category of "hybrid reseller".[24] The term "hybrid reseller" refers to carriers that operate in Canada through a mix of leased and owned transmission facilities, as opposed to carriers which operate solely through the transmission facilities of an underlying carrier. While we recognize that the regulatory treatment of "hybrid resellers" may have ramifications for competition in the Canadian resale market, we note that neither of the applicants before us falls within this CRTC category, and the record in this proceeding does not adequately address this issue.[25] Therefore, as neither applicant qualifies as a "hybrid reseller" in Canada, we need not address this issue in the context of this ruling's equivalency finding.[26]

12. AT&T also contends that the terms and conditions attached to the resale of WATS/discount toll services[27] and the level of contribution charges that resellers must pay limit the ability of U.S. resellers to operate in Canada and, thus, calls Canadian equivalency to the U.S. market into question. These considerations, however, apply equally to U.S. and Canadian resellers. Moreover, they apparently have not prevented a large number of resellers, including U.S. based carriers, from operating and competing in Canada.[28] The evidence thus indicates that these terms and conditions for the resale of WATS/discount toll services and contribution charges are administered on a nondiscriminatory basis, and do not appear to create a significant impediment to competitive entry and operation in the Canadian resale market.[29] We therefore conclude that these concerns are not sufficient to preclude a finding of equivalent resale opportunities existing between Canada and the United States.

13. The second major factor emphasized by the applicants is that the conditions placed on operation in the Canadian resale market are administered without discrimination based on a carrier's country of origin. Indeed, AT&T apparently agrees with the applicants that the CRTC decisions and tariff language indicate that the registration requirements, general tariffs and contribution charges will be administered on a nondiscriminatory basis.[30] We also note that CRTC requires that all Canadian telephone company services and facilities available to resellers, including interconnection, be made available to competitors at general tariff rates.[31]

14. Finally, the applicants argue that Canada offers equivalent resale opportunities because all resellers may interconnect private lines to the Canadian PSTN under the same terms and conditions.[32] While AT&T does not dispute the legal ability to make such interconnections, it argues that equivalency must also include the ability of the reseller to control technical routing of traffic. AT&T observes that CRTC's policy to require the "maximum use of Canadian facilities" prohibits resellers from (i) transporting traffic destined between two points in Canada via the United States, or (ii) routing Canadian-originated international traffic via lower-cost routes through the United States.[33] However, as AT&T notes, U.S.-originated traffic destined

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[23] AT&T suggests that action on these applications would be premature in light of the court stay and scheduled October appeal of two sections of the CRTC *Competition Order* relating to (i) the Canadian telephone companies' inability to receive compensation for costs for allowing interconnection to their networks, and (ii) new entrants receiving discounts on contribution charges. However, these aspects appear to relate only to facilities-based carriers. Although AT&T also includes the Petition for leave to appeal CRTC's *Reseller Status Order* as an argument to withhold action on these applications, we note that the court has dismissed this Petition.

[24] *See* CRTC *Competition Order* at note 15.

[25] Neither fONOROLA nor EMI appears to own facilities in Canada.

[26] We may review the status of the Canadian resale market and the scope of our equivalency finding as new decisions, policies and legislation are adopted.

[27] AT&T had initially raised the issue of the prohibition of resale of WATS and other discount toll services within Canada as a potential economic barrier to market entry because of distribution costs for calls within Canada. However, pursuant to the *Competition Order*, WATS and other discount toll services may now be resold in Canada as in the United States. AT&T has since indicated that it would be premature to act on these applications until the tariffs for the resale of WATS and other volume discount services were actually implemented. The Canadian Department of Communications has confirmed that these tariffs have been filed with the CRTC and are in effect.

[28] *See* supra n.20 and accompanying text. AT&T's own comments reveal that market conditions in Canada already support competition among a number of resale carriers, including some U.S.-based carriers. *See* AT&T Comments at 2.

[29] Moreover, we note that the scope of the services permitted to be resold in Canada appears to be equivalent to that in the United States.

[30] AT&T does not argue that any current Canadian laws or regulations discriminate against U.S.-based resellers.

[31] *See* fONOROLA's Opposition, Attachment.

[32] In recent *ex parte* filings dated August 26 and September 15, 1992, AT&T argues that we should condition an equivalency finding upon the adoption of an "equal access" plan for resellers in Canada, including tariffs authorized to allow trunk side access and the availability of "1+" dialing for the resellers. We agree with AT&T that trunk side access for resellers in the Canadian market would be preferable to line side access, which requires seventeen digit dialing. However, no reseller -- Canadian or foreign-based -- can get "equal access" in Canada. Further, we note that resellers receive discount contribution charges as compensation for the line side, or non-equal access interconnection. Since there are 80 Canadian and foreign-based resellers operating in the Canadian market, it appears that line side access, coupled with the discounted contribution charges, has not precluded the creation of a competitive resale market. Therefore, we find that the lack of equal access is not sufficient to prevent an equivalency determination. We note, however, that CRTC has just recently received an application on the issue of trunk side access and has placed it on public notice.

[33] *See* CRTC Decisions 91-10 and 91-21. AT&T Petition to Deny fONOROLA application, p. 3.

either for overseas or the U.S. may be routed through Canada. AT&T contends this Canadian policy precludes a finding of equivalency.

15. While we do not endorse Canada's policy of requiring "maximum use of Canadian facilities", we note that all carriers, whether Canadian- or foreign-based, are subject to this routing restriction. Moreover, we find no benefit in the adoption of a blanket restriction on traffic routing in the U.S. to mirror Canada's restrictive policy. Yet, with respect to the routing of third-country traffic, we recognize that allowing the resale of private lines to transport U.S.-originating or -terminating traffic through Canada would allow circumvention of our *International Resale Order* by permitting service to or from countries not yet determined to be equivalent.[34] The net effect would be "one-way" resale between the U.S. and those third countries, a result we have consistently sought to avoid. In order to safeguard against the circumvention of our *International Resale Order*, we find it necessary to adopt a policy with respect to international private line resale between the United States and Canada that prohibits the routing of U.S.-overseas traffic through Canada.[35] This approach should prevent evasion of the international settlements process between the United States and third countries and circumvention of our requirement that a foreign country afford equivalent resale opportunities.[36] Accordingly, all authorizations for the resale of international private lines between the United States and Canada will be subject to the condition that the traffic carried over such private lines be limited to U.S. - Canada traffic only, that is, traffic originating in the United States and terminating in Canada or traffic originating in Canada and terminating in the United States.[37] In addition, all such authorizations are also subject to the "no exclusive arrangements" condition set forth below in paragraph 23.

16. Based upon our review of the record, we find that the current legal, regulatory and market circumstances in Canada which provide open entry for, and nondiscriminatory treatment of, U.S.-based carriers, coupled with the conditions set forth below, support a finding of equivalent resale opportunities in the context of the applications before us. Given our policy of encouraging resale of international switched services, and private line services where equivalent resale opportunities are available, we find that the public interest is served by the grant of fONOROLA's and EMI's applications, subject to the conditions set forth below.[38]

IV. ORDERING CLAUSES

17. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of resale of international private line services between the United States and Canada.

18. Accordingly, IT IS HEREBY ORDERED that applications File Nos. I-T-C-91-103 and I-T-C-91-050 ARE GRANTED, and (i) fONOROLA is authorized to resell international private lines for the provision of IMTS, facsimile, and data services between Canada and the United States on a resale basis and (ii) EMI is authorized to resell international private lines for the provision of its 800 service from the United States to Canada on a resale basis.

19. IT IS FURTHER ORDERED that fONOROLA and EMI, respectively, are authorized to lease 56 DS-1 circuits and 4 T-1 circuits pursuant to tariff for the provision of their authorized resale of international private lines for switched services between the United States and Canada.

20. IT IS FURTHER ORDERED that EMI is authorized to provide international switched voice, facsimile and data services by the resale of international switched voice services taken pursuant to the tariffs of authorized international common carriers between the United States and the international points listed in the relevant tariffs.

21. IT IS FURTHER ORDERED that the grant of application File No. I-T-C-91-103 is subject to the condition that fONOROLA will be classified as dominant in the provision of its authorized services between the United States and Canada, subject to modification pursuant to our ruling in CC Docket 91-360.

22. IT IS FURTHER ORDERED that the authority granted herein to resell private lines between the United States and Canada is limited to the provision of the authorized services between the United States and Canada only -- that is, private lines which carry traffic that originates in the United States and terminates in Canada or traffic that originates in Canada and terminates in the United States.

23. IT IS FURTHER ORDERED that neither the applicants nor any persons or companies directly or indirectly controlling them or controlled by them, or under direct or indirect common control with either of them, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which either applicant or any such persons or companies are parties.

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[34] We note that the prohibition on routing Canada-Canada traffic through the U.S. does not raise the same concerns of evasion of our *International Resale Order* given that we are herein authorizing the resale of private lines between the United States and Canada.

[35] In its Opposition, fONOROLA indicates that it would be willing to accept a condition prohibiting the routing of U.S. originated traffic via Canadian private lines to third countries.

[36] As noted in the *International Resale Order*, any violation of our international resale policy may be challenged at any time by either the Commission or an interested person. Moreover, we have authority through Sections 312(b) and 503 of the Communications Act and our international settlements policies to take corrective action to address any such violations.

[37] We believe that by limiting these resellers to providing service between the United States and Canada only, we are responding to AT&T's concerns regarding the potential negative impact of allowing routing of U.S.-third country traffic through Canada and any foreign carrier affiliation between a Canadian-based applicant and a third country carrier.

[38] We recognize that authorization of international private line resale in both directions could have an impact on the net settlement payments because switched traffic to and from the United States which is included in the settlements process is likely to be diverted to private lines. However, the relatively low level of accounting rates for telephone service between the United States and Canada should help to minimize the impact on the U.S. net settlement payments to Canada. We note here that the accounting rates with Canada are at a level significantly lower than with any other foreign correspondent relation.

24. IT IS FURTHER ORDERED that both applicants shall file copies of any operating agreements entered into by the applicants, and fONOROLA, as a dominant carrier, shall file copies of such agreements entered into by parent/affiliate companies that affect traffic or revenue flows to or from the United States within 30 days of their execution.

25. IT IS FURTHER ORDERED that the applicants shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this Order.

26. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

27. IT IS FURTHER ORDERED that fONOROLA, as a dominant carrier, shall request Section 214 authorization for all circuit additions to Canada, pursuant to Section 63.01 of the Rules, 47 C.F.R. §63.01.

28. IT IS FURTHER ORDERED that EMI shall file semi-annual reports of circuit additions to certificated points, pursuant to Section 63.10 of our Rules, 47 C.F.R. §63.10.

29. IT IS FURTHER ORDERED that fONOROLA, as a dominant carrier, shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and Canada within 90 days from the end of each calendar quarter.

30. IT IS FURTHER ORDERED that the applicants shall file all arrangements for private line interconnection to the U.S. public switched network, pursuant to Section 43.51(a) of our Rules, 47 C.F.R. §43.51(a).

31. IT IS FURTHER ORDERED that grant of these authorizations is conditioned upon Canada's continuing to afford resale opportunities equivalent to those afforded under U.S. law.

32. This Order is effective upon adoption. Petitions for reconsideration under Section 1.106 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-327

In the Matter of

Amendment of Section 73.202(b), RM-5703
Table of Allotments,
FM Broadcast Stations.
(Frederiksted, Virgin Islands)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 1, 1992; Released: November 12, 1992

By the Chief, Allocations Branch:

1. At the request of Judith Mendez ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 5202 (1987), proposing the allotment of Channel 273A at Frederiksted, Virgin Islands, as the community's first local FM transmission service. Petitioner filed comments in support of the proposal reaffirming her intention to apply for the channel, if allotted. Comments in support of the proposal were also filed by Pan American Equities, Incorporated, expressing its interest in applying for the channel. Opposing comments were filed by Bestov Broadcasting, Inc. ("Bestov").[1]

2. A staff engineering analysis reveals that the proposed allotment of Channel 273A at Frederiksted is short-spaced to Station WIAC-FM, Channel 273B, San Juan, Puerto Rico.[2] However, an alternate Class A channel has been found which would avoid the conflict. We believe the public interest would be served by allotting Channel 278A to Frederiksted, Virgin Islands, since it would provide the community with its first local FM transmission service. Channel 278A can be allotted to Frederiksted in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.6 kilometers (11.5 miles) east to avoid a nearby airport.[3]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 28, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Frederiksted, Virgin Islands	278A

4. The window period for filing applications will open on **December 29, 1992,** and close on **January 28, 1993.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Bestov's comments regarding a short-spacing to its application (BPH-861201IE) for a change of transmitter site and an increase in tower height for Station WIAC-FM, Channel 273B, San Juan, Puerto Rico, to the proposed allotment of Channel 273A at Frederiksted are moot, given our resolution in this proceeding.

[2] Bestov's application to modify Station WIAC-FM's site and antenna heightwas granted on February 14, 1989. The station's license was issued on August 12, 1991.

[3] The coordinates for Channel 278A at Frederiksted are North Latitude 17-43-00 and West Longitude 64-42-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-365

In the Matter of

American Network Exchange, Inc.

ORDER
Proceeding Terminated

Adopted: November 9, 1992; Released: November 9, 1992

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, the Common Carrier Bureau released orders directing certain operator service providers (OSPs), including American Network Exchange, Inc. (Amnex), to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that Act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On October 5, 1992, Amnex filed revisions to its informational tariff which reduce its rates substantially. Amnex's October revisions represent a reduction of approximately 25 percent from the highest total charge Amnex had reported earlier. It was on the basis of the rates Amnex had in effect at the time of the December 23 Order, that the Bureau found that Amnex's rates appeared to be unjust and unreasonable. Amnex no longer charges the rates that prompted this proceeding. Amnex therefore need not provide further justification for its rates and charges at this time and is not required to announce, at the beginning of each call that it handles, that its rates are available on request.[2] We hereby terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-365 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] *See, e.g.*, In the Matter of American Network Exchange, Inc., 7 FCC Rcd 163 (Com.Car.Bur. 1992).

[2] We emphasize that this order does not represent an affirmative finding that Amnex's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-413

In the Matter of

Provisions for Introducing
Modular Personal Computers
and for Facilitating Upgrades
of Digital Devices

ORDER EXTENDING TIME TO FILE COMMENTS

Adopted: November 6, 1992; Released: November 10, 1992

Reply Comment Date: December 14, 1992

By the Chief Engineer:

1. A *Further Notice of Proposed Rule Making (FNPRM)* in the above entitled proceeding was adopted by the Commission on July 1, 1992, and released on July 30, 1992. Comments in this proceeding were due on October 21, 1992, and reply comments are due on November 13, 1992.

2. The Computer and Business Equipment Manufacturers Association (CBEMA) filed with the Commission, on October 30, 1992, a request for a 30 day extension of the reply comment period. CBEMA states that the several proposals outlined in the *FNPRM* have generated substantial controversy, and that, based on the comments already filed in this proceeding, there is not yet a consensus view on the best approach for accommodating modular personal computer designs. Thus, CBEMA indicates that additional time is needed to allow its member companies' representatives to develop industry positions and to meet with other association members to develop a consensus on this issue.

3. In order to ensure that modular computer systems continue to comply with our standards with a minimal burden to industry and the public, a comprehensive input from manufacturers of personal computers is desirable. Thus, an extension of the reply comment period that would permit a consensus on test procedures and regulations would be in the public interest. Accordingly, it is ordered, pursuant to the delegated authority contained in 47 CFR 0.241(a), that the period of time for filing reply comments is extended until December 14, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
Released: October 27, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Greater Los Angeles Radio, Inc. 8210-AJZ
Licensee, Radio Station KLSX(FM) 92020231
Two Kennedy Blvd.
East Brunswick, New Jersey 08816

Dear Licensee:

This letter constitutes a NOTICE of APPARENT LIABILITY for a FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended.

The Commission has received information indicating that Radio Station KLSX(FM), Los Angeles, California, may have violated 18 U.S.C. § 1464 by broadcasting allegedly indecent material during "The Howard Stern Show" between approximately 6:00 a.m. and 11:00 a.m. on various dates between October 30, 1991, and December 6, 1991. Transcripts of the allegedly indecent broadcasts, taken from transcripts and tapes submitted by the complainant, are attached.

Pursuant to 47 U.S.C. § 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

We believe that the subject excerpts from "The Howard Stern Show" are indecent in that they contain language that describes sexual and excretory activities and organs in patently offensive terms. Moreover, because the material aired at times when there was a reasonable risk that children may have been in the audience (between approximately 6:00 a.m. and 11:00 a.m.), it is legally actionable. Thus, it appears that on October 30, 31, November 5, 7, 15, 17, 20, 25, 26, 27, December 5, 6, 1991, Station KLSX violated 18 U.S.C. § 1464 by airing indecent programming. Accordingly, pursuant to Section 503(b) of the Communications Act, Greater Los Angeles Radio, Inc. is hereby advised of its apparent liability for a forfeiture of one hundred five thousand dollars ($105,000) for its apparent willful and repeated violation of 18 U.S.C. § 1464 on the dates set forth above. The amount specified was determined by using the criteria set forth in the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom., USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), and the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended. The base amount for an indecency violation is $12,500. We believe the egregious nature of the material, as well as the substantial number of days on which such indecent material was broadcast (12 days) severely aggravate the violation. Thus, we are adjusting the forfeiture amount accordingly. *See Policy Statement, supra*, at 4700.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 U.S.C. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on October 27, 1992.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Radio Station KLSX-FM, Los Angeles, CA

Date/Time Broadcast: October 30, 31; November 5, 7, 15, 17, 20, 25, 26, 27; and, December 5, 6, 1991, between approximately 6:00 a.m. and 11:00 a.m.

Material Broadcast: Howard Stern Show

HS: Howard Stern
RQ: Robin Quivers
GR: Geraldo Rivera
LK: Lenny Kravitz
SG: Stacey Gillena
WO: Woman in studio
MV: Male Voice
FC: Female Caller
FV: Female Voice

October 30, 1991

RQ: Pee Wee Herman is trying to make a deal. He and well He wasn't, but his lawyers were in court down in Sarasota, Florida

HS: If he makes a deal, don't shake his hand.

RQ: And the new deal offered by the prosecution is that if Pee Wee pleads no contest then he would have to pay a $50 fine and do 50 hours of community service.

HS: Good. Then elect him governor of Louisiana. It can't be any worse.

RQ: So that would mean that the state would not try to press the issue and determine guilt and there would be, uh, eventually this would all go away. I suppose.

HS: I see.

RQ: And he would only have to pay $50 and do some community service. They are mulling over this offer at this time. Pee Wee was not required to appear in court because he is working on a movie.

HS: Let me tell you this Pee Wee. If they are going to make him do public service, the service should be he should go to every movie theater in Sarasota and scrub the theater seats where guys drop their load. Because I'm going to tell you something that that's disgusting. Imagine I go to the movie theater and I'm sitting in Pee Wee's mess.

RQ: It's interesting, because the other day the lawyers for Mr. Reubens decided they would try another argument to get him out of the case. They wanted the case dropped on the grounds that nudity is expected at a triple x-rated theater. So that Pee Wee was only doing what was expected. If he was nude at the time.

HS: That's brilliant. That's some defense, because there's a movie on there you're allowed to whip it out and spew that evil gunk all over everybody. Now, I don't know about you but I've heard people actually say that this is not a serious offense. He did not hurt anybody.

* * *

KLSX-FM October 31, 1991 Page 2

October 31, 1991

HS: First of all I had a trauma as a child, which I don't mind admitting to you.

RQ: Which was?

HS: I was outside one night. I happened upon a house and I looked through the window inside the window, you'll be interested in this was my hispanic neighbor, humping a cancer ridden stripper.

RQ: Oh stop it. You are sick.

GR: Tell me more, right?

HS: Her husband was in the other room.

HS: Help me help me, where is my wife?

HS: No let me tell you something, first of all, my parents first they gave me the genes to make me 6'5" with no penis to speak of. You're not an outcast. I couldn't even change in the locker room.

GR: I heard that about you

HS: Well it's true. Then they stuck me in a black neighborhood, you'd be crazed too.

GR: I would have wet the bed too.

HS: You're not kidding, it was a traumatic upbringing to say the least. There was a time I even hit on black women.

* * *

HS: The closest I came to making love to a black woman was, I masturbated to a picture of Aunt Jemima.

GR: Oh, come on.

HS: On a pancake box. (Laughter) All right? And that was it. And then I heard Aunt Jemima died in a plane crash.

GR: Were you really one of those two finger guys?

HS: Yeah. (Laughter) Yeah, Geraldo, oh boy. No, I did it right on her kerchief. (Laughter)

* * *

HS: You ever see "Truth Or Dare?"

LK: No, I saw some of the clips and she.

HS: Let me tell you something, the you tell me, you're a man of peace, this is a woman doing her makeup, right?

LK: Right.

HS: Kinda heavy.

LK: Mmm.

HS: So she gets drunk one night, and evidently she wakes up in a hotel and her ass is bleeding, all right. So.

LK: Whose ass is bleeding?

HS: The woman in the movie.

KLSX-FM October 31, 1991 Page 3

LK: Right, right.

HS: So she goes to Madonna, she says, listen, I woke up drunk, my ass is bleeding.

LK: You're serious, this is in the film?

HS: I'm being serious.

LK: Okay. I think.

HS: I think you might want to rent this.

LK: Okay.

HS: And she goes, my ass is bleeding Madonna. I woke up in a hotel, I know I was drunk, I was with a bunch of guys and I wake up and my ass is bleeding. I'm really upset. You know what Madonna does?

LK: What?

HS: She laughs. (Laughter) Has that ever happened to you?

LK: Woke up with my ass bleeding? No. (Laughter)

HS: I'm sick of this show.

RQ: Let me tell you.

HS: I got to get a legitimate career.

* * *

HS: Who's she with Richard Gere?

LK: Richard Gere. No. He wakes up with his ass bleeding sometimes.

* * *

HS: What were you doing? I mean, Lisa is walking around the house, thinking she could trust you and you stand there staring at her underpants and stuff. Shannon, you'd be ashamed of yourself. Did you ever masturbate and think about Lisa? All the years you knew Lenny?

RQ: (Laughs)

LK: When he masturbates, he thinks about me.

HS: He does. That's very sad.

* * *

November 5, 1991

RQ: Meanwhile, Pee Wee Herman has taken the deal.

HS: you see if men are allowed to masturbate in public will there be no stopping them? What will they do next.

RQ: Do you really think this is anything more than a slap on the hand?

HS: I'd like to Karate Pee Wee's penis.

RQ: Laugh

HS: Let me tell you something, I would be pretty upset if this Pee Wee was sitting behind me. X-rated or not Robin. I have been to x-rated movies, particularly as a young man.

RQ: Umm.

HS: in my teens.

RQ: Which you should not have been able to get into anyway.

KLSX-FM November 5, 1991 Page 4

HS: Right, true. I will not say no to that. But I have been to X-rated movies and if someone were sitting behind me, blurting their love juices all over the back of my seat, I got news for you.

RQ: Let me tell you, let me tell you what this has led to. The other day, I was in a movie theater

HS: Uhm.

RQ: and, at the end of the movie, you know, when the lights come up, this man,

HS: Your buttocks was bleeding.

RQ: Stop it.

HS: I know you told me about this off the air.

RQ: And you laughed. No.

HS: I didn't know you were going public with it.

RQ: This man stood up.

HS: Robin got out of the movie theater there was blood coming out of her buttocks.

RQ: And I saw him buttoning his pants, buttoning his belt and then I said no. no. no. He's not and then zipping his fly. So what was he doing during this movie that his pants were completely undone.

HS: He was staring at Fred Norris' picture, press photograph. (Laughter).

HS: So was he the one who made you bleed? or was that something else?

RQ: I was not bleeding. Will you stop that.

HS: What Robin is talking about is if you go to a movie, I don't care what movie it is,

RQ: This was a regular old movie.

HS: When I go to a movie, I don't need a hail storm coming out of some guy's genitalia. And I see the Pee Wee's offense as being a serious one. Now I know people think I'm joking but I am absolutely not. If my daughters or my wife were in a movie theater and they came back with some pervert throwing a huge hail storm on to their backs.

RQ: Wouldn't you be upset?

HS: I'd sure as hell would. I'd beat the piss out of him.

RQ: If you could find him.

HS: Can't find him.

RQ: Under the new deal that Pee Wee struck, he is going to have to pay a fine of $50 and perform 50 hours of community service.

HS: That's disgraceful. He should have done jail time, hard time.

RQ: He'd be free of a conviction on the misdemeanor charge because prosecutors said they would not seek a guilty finding. So no record. So how do you like that MTV audience when they stood up and cheered him and applauded for his masturbation. Shocking.

RQ: He was arrested on July 26 after detectives said they saw him masturbating twice in 10 minutes.

HS: Twice in 10 minutes. I, who am the head of the masturbation club. I, I run a masturbation society. I'm someone who is totally devoted to masturbation. I must tell you to do that twice in ten minutes is unbelievable.

RQ: So Reuben's attorney says that this was an offer they could not refuse. Even though he insists that had it gone to trial, Pee Wee's innocence would have been proven.

KLSX-FM November 5, 1991 Page 5

HS: Let me tell you something. I was watching that MTV show when these people stood up and started applauding. I was sickened. I said I wish that Pee Wee would come out and coat the whole front row with his love juice and really give it to them right in the face. And, as punishment, Pee Wee should be forced to sit in a tub of sperm.

RQ: Oooh

HS: Oooh that means feels good, or oooh bad.

RQ: No. No.

HS: Oh I see.

HS: and then dunk him.

RQ: His head has to go under?

HS: His head has to go under Robin, and he can't shower for a month. That would be his punishment.

RQ: Oh.

HS: And I guarantee that he'd keep it in his pants for the rest of his life.

RQ: You don't think he's learned a lesson from this.

HS: Everybody feels bad for him because he's a celebrity. Just picture him not being a celebrity. Just some perv who's sitting behind you in a movie theater whipping it out and playing with himself all over the back of your seat. (sounds) Then ask yourself what you'd like done with him. Stop with the Pee Wee's play house.

RQ: It's a sad day - a sad day.

RQ: Yeah cause everybody says, you know, well CBS yanked his show off before there was even a trial.

HS: Oh please.

RQ: All that stuff. You know all the sympathetic people

HS: God bless those hard working police officers in Sarasota who were able to uncover this horrible crime.

RQ: Who had the time?

HS: What's next? Pee Wee goes to church and puts a thumb in his ass? And what are we supposed to accept that as normal behavior?

RQ: What will he do next? Where will it end, one never knows.

HS: Well his name is Reubens, he probably goes to synagogue.

RQ: Yes.

HS: Will he put his thumb in his butt in the synagogue? In front of the head Rabbi? (laughter).

RQ: I think not

HS: Of course not.

RQ: Its' sad, but what can you do?

HS: Disgusting. Disgusting.

RQ: We're in the minority. Everybody else thinks Pee Wee is fine.

HS: Oh a minority. let me tell you something Robin. There are people giving standing ovations for this guy.

RQ: That's right. I'm telling you we're fighting the tides. 1991?

HS: I'm going to send them on a sailing trip together. Tom Geozono? and all the executives at WOR

RQ: Wouldn't it be worth it to charter a boat.

HS: Yeah

RQ: After we find out about some really, like that storm that came up we should have had them on a boat then.

KLSX-FM November 5, 1991 Page 6

HS: Right

HS: Like Gilligan's island.

RQ: (Laugh)

HS: And I don't wish them harm. It would be great. Tom could go fishing with, ah, I'm thinking like ah. What's the general manager's name over at WOR?

RQ: Oh goodness

HS: Michael Alexander.

RQ: Michael Alexander.

HS: Tom and Michael Alexander going on a fishing trip.

RQ: Could you imagine the conversation?

HS: Oh it would be frightening. Two guys staring at each other.

RQ: (Laugh).

HS: Ah..... and then underneath Fred I'd send them in scuba outfits to drill holes in the boat and it would sink. Tom Geozano forced to drink his own urine.

RQ: Oh.

HS: Oh it would be unbelievable.

RQ: Wouldn't you love it?

HS: Michael Alexander. (gargling noise) hey man don't bogart that urine, my friend. Pass it over to me.

HS: Today in the news ladies and gentlemen, Michael Alexander and Tom Geozano forced to drink their own urine. (gargling noise). After what started out as a pleasant fishing trip, where the two of them had a lengthy conversation, Michael Alexander said (gargling) and, Tom Geozano said back (gargling sounds). Then they, Fred Norris drilled holes in the boat, they were stranded at sea and they drank their own urine. (gargling) On day 10 Geozano announced that he had to do a number 2.

RQ: Oh no.

HS: Michael Alexander announced lunch time and

RQ: Oh geez.

HS: That was the end of the party.

RQ: Good bye.

HS: Good bye ladies and gentlemen. That is our newscast and good night.

* * *

November 7, 1991

HS: First I want to just strip and rape Mark and Brian, I want my two bitches laying there in the cold, naked, and I want them crawling on their knees to me, and I want them coming to their king and master.

RQ: Well, I don't know if you want this rape imagery.

HS: Yeah, I want it.

RQ: Oh.

HS: I'm sorry, you don't have to be tagged with it, I'll take it.

RQ: (Laughs)

HS: I want them bleeding from the buttocks.

RQ: Oh.

HS: I want them to wake up one morning and go, our buttocks' are bleeding. And then.

KLSX-FM November 7, 1991 Page 7

RQ: You know we woke up in a hotel room.

HS: Hey, my frickin' buttocks is bleeding. Then, then the guy is going, wait a second, what happened last night? Then, then they'll open the rating books, oh my god, we were raped by the ratings. It's gonna be beautiful. Stern's in town, our buttocks is bleeding, I don't get it.

RQ: What happened?

HS: Wait a second, oh, Howard Stern is here, no wonder our buttocks is bleeding. Creeps.

* * *

November 15, 1991

[A parody of "The Honeymooners"]

RALPH: Norton. I just found out that Alice can't accept the fruit of my loins.

NORTON: Hey before you give her the fruit of your loins Ralphy, you gotta take off your fruit of the looms.

RALPH: Very funny, Norton. Very funny. Hardy har har. It's just like you to making jokes when Alice can't get pregnant.

NORTON: Hey this sounds serious Ralphy.

RALPH: You bet.

NORTON: What's the matter no lead in the pencil?. No grease in the gun. No stone in the baloney, Ralphy boy?

RALPH: I'll just have you know Norton that Alice is the one that's infertile.

NORTON: Hey. Alice is the problem. What's the matter Ralphy boy, no water in the canyon. No jing in the jang. No clams in the dam. No jelly in the smelly, Ralphy boy?

RALPH: Norton. Will you shut up, Norton? Don't you realize that if I have no son, no Ralph Junior, it's the end of the Kramden line.

* * *

NORTON: Why don't you try what some couple did in New Jersey?

RALPH: What's that Norton?

NORTON: What do you call. Artificial Interpretation Ralphy. That's where you take some of your love lava. you put it in the turkey baster Ralphy and you smear it on another woman's ovaries like a chinese window washer. Ralphy. Bing a di bang a di. Ya pay $10,000 to the woman and the kid is yours. Ralphy.

RALPH: Really.

NORTON: Yeah, there's Trixie all she's using her birth canal lately for a place to store my spare toilet plunger. I used to use for the sewer Ralphy.

RALPH: I don't know. Norton. I just don't know.

NORTON: Ah come on. Take this tupperware bowl, Ralphy, and a copy of Penthouse.

RALPH: Great.

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NORTON: Take it in to the bathroom over there and I'll wait right here. How ya doing in there Ralphy. Ya ok big Ralphy.

RALPH: Oh.... oh....(sounds of delight) Wow. (implication is that he is masturbating)

NORTON: Hey big Ralphy. Check out page 43. Ralphy boy, there's some droopers on that babe.

RALPH: Wow Norton. Oooh. Norton.

NORTON: I'd like to pump 'em up. It's like a rusty ole

RALPH: (Sound of flushing toilet).

RALPH: Here Norton. Put this love lava in a safe place. I gotta rest a while here in the can.

NORTON: All right there Ralphy boy. I'll close the door.

NORTON: While you're recuperating Ralphy. I'm going to ask Trixie if she wouldn't mind renting out her baby gutter. Maybe I should put this pork chop chowder in the refrigerator for some safe keeping. I'll be back in a minute Ralphy boy. RALPH: Hey Norton. Norton. Where the hell did he go. Boy, I tell you sex makes me hungry. Wonder what Alice left me for lunch. I'll check into the refrigerator here. Oh boy. Custard. I just love custard. (He's eating it). Mmmmm. This is one of Alice's best recipes. I'll tell you. Oh boy.

NORTON: Hey, Ralphy. Ralphy boy. What ya eating over there Ralphy?

RALPH: Don't bother me Norton there's only enough custard here for one.

NORTON: But Ralphy boy, let me just say this

RALPH: Just this one time, Norton, I'm going to eat this custard by myself.

NORTON: But Ralphy boy, I'm not sure you should be eating that custard. I mean it ain't custard.

RALPH: What are you talking about Norton?

NORTON: I said it's not custard there, Ralphy boy.

RALPH: Well if its not custard, then what is it?

NORTON: Well it's not a what, Ralphy, it's a who.

RALPH: A who, Norton.

NORTON: You're eating up Ralphy Junior.

RALPH: Oh my god. I'm going to be sick. (throw up noises).

NORTON: Hey Ralphy boy. Look at the bright side, you may have lost a son but you gained a pound.

* * *

[Song]

Robin. From the moment I heard you, doing news ... Your breasts fill my thoughts when I'm dreaming... Touch me where there's circumcised juice. Robin. You're so beautiful on the TV show. You've got a booming system. Robin. When you check yourself for breast cancer. Let me, give you assistance. Robin.

* * *

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HS: Boy. What I wouldn't do for you if you were my girlfriend. Jesus. man oh man. You'd get the full treatment. You'd get that rocket of love. The hot beef injection.

WO: I'll take it.

HS: Oh you would? All right you are not a bad girl at all. You're a good girl that's what you are. No wonder you're Miss English Leather.

RQ: Any other titles, besides?

HS: Miss Howard Stern.

WO: Oh that's a nice title. I don't mind that one.

RQ: Geez. I could see that sash.

HS: Yeah. That's a big sash.

WO: What else. I'm also coming out in the hot rod magazine, American Rodder.

HS: My god it's crowded in my pants. Man oh man do you shave completely?

WO: Just about. I like those skimpy bikinis, what else are you gonna do.

HS: Really. I'll give you $50 if you let me see.

WO: 50 bucks.

RQ: What? I didn't even hear that. You offered her money.

HS: Excuse me, Robin, I'm negotiating. She heard it. Have you ever won Miss spread eagle?

WO: No

HS: Too bad.

RQ: So, in Miss Rodder, are you in a bikini?

WO: Yes. American Rodder. It's a whole layout.

HS: It's hot rod. $65.

WO: No. But I brought you Howard a gift today.

HS: What's that?

WO: This is my own poster.I came out with my own poster.

HS: No. Let's talk about a different poster.

HS: Do you shave completely?

WO: Yes. Pretty much so.

HS: What do you use a razor or an electric shave?

WO: A daisy.

HS: Yeah. What, every morning in the shower. Like you just.

WO: Yeah. Its' easy.

HS: You do it yourself. You don't get any bumps or anything?

WO: No. I'm dutch and German. I'm light. I have no problem.

HS: Do me a favor. Can you stand up so I can see if you have any bumps. Razor bumps. Any hair on your butt? Turn around. Wow. Look at that, nothing. Boy, you're a real woman. I had a transsexual in here yesterday and I wanted to vomit. Guy had a big flat ass like a man.

* * *

RQ: You'd better be a good boy.

HS: No, I can't be good because it's the weekend. (Unintelligible)

RQ: You're going to lose all of us our jobs.

HS: You think I'd say penis?

RQ: Oh no.

HS: I don't care what the FCC says. Where is the FCC?

RQ: Somebody stop him.

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HS: Hey FCC, penis.

RQ: Put your hand over his mouth. (Laughter).

HS: I don't care, it's the weekend, baby.

RQ: It's a stampede in here, you can't say that (stampede sound effect).

HS: Yeah, I don't care. I do draw the line at vagina. Whoa, whoa, I can't believe I just said that word.

RQ: That's it. Here they come.

HS: Uh, ooh, here comes the thought police, I don't believe it baby. Oh my goodness. Oh, look at those horses. They're going to trample over you, Robin.

RQ: Watch out. (Laughter).

* * *

[Magic Johnson Song. Sung by Howard Stern]

Did you have sex with Magic. He's got the HIV. He could have infected you and you'd be diseased. Oh that Magic, when he banged you good. He didn't wear rubbers though he knew that he should. If he'd worn a condom you could probably relax. Protection is important when you're nude on your back. No one was safe with Magic. When he hit the road. A dangerous penis when he dropped his load. Take Magic to cure you of AIDS. Soon you could weigh as much as you did in second grade. It's tragic about Magic and this awful thing why couldn't it have happened to Larry King. Do you believe poor Magic and the sad sad truth. He should have used a Trojan or watched Dr. Ruth. Oh that Magic. He got horny and loonie. He should have gone with Pee Wee to some porno movie, although he would have been arrested pretty quick. Simple masturbation doesn't get you that sick. Can you believe in Magic. Believe that Magic could have used control instead of using women like a hockey goal. I don't know. Oh man. Is Eddie Murphy nervous and Arsenio? I'm talking magic.

* * *

[Discussion about Michelle Pfeiffer].

HS: Buy me a nice ranch. Be there banging away all day and night.

RQ: Fisher Stevens, I think his name is.

HS: Fisher Stevens. You put me in Fisher Stevens' shoes, boy, and I'll show you one satisfied Michelle Pfeiffer. That girl couldn't walk she'd be so sore. She wouldn't know what hit her. Between the vibrators. I would not even need a vibrator. I'd go right in digging for gold. You are not kidding. I'd do everything to her. What ever you want honey. Just go do another movie. Make another 50 million. If you don't mind I'm gonna take care of the ranch. I'll mess around with my hobbies. I'm going to relax. I'm going to sleep in tonight. You don't worry about a thing darling.

Boy her rump would be more black and blue than a Harlem cub scout. I'm not kidding Robin.

* * *

KLSX-FM November 17, 1991 Page 11

November 17, 1991

HS: And copy my style, and then when I come to town suddenly they have no career and Mark and Brian are going to suffer and pay for what they've done to me.

FC: They're horrible, they're horrible. No way.

HS: Two little pussies with their dildos, that's what's going to happen to them. That's what, they're going to be crawling into a hole. Little freaks. You're finished because you steal from me and you know it. Why don't you 'fess up. How about that kid who called.

* * *

November 20, 1991

HS: Let me tell you something, since we found out that you like sex where the rest of us wipe.

RQ: I don't love it.

* * *

November 25, 1991

HS: Why don't you guys cut your penises off? Now I'll watch that.

RQ: Oh good, this week we're going to be in boot camp and not cut our hair. Okay.

HS: Oh gee.

RQ: (Laughs)

HS: Living on the edge. You two little pussies are going right down the tubes. You think you're TV show was cancelled, wait 'til you get smacked with your radio show going down. Mark and Boring, little pussies, hate you. Steal my material. Oh, we never heard of 'em before. Yeah, two Okies from Musgokee and you never heard of me before.

Pretty obvious what's going on in Los Angeles, every day people turning off Mark and Boring and coming over to us.

* * *

HS: I think that's a real act of perversion to, to masturbate in a public place. I, even though it is an X-rated theatre

FV: It was a triple-X rated theatre.

HS: Whatever, I've been to that triple-X rated theatre and I'm going to tell you something, I've been to a lot of triple-X rated theatres.

FV: Now, I've never been to one.

HS: Now let me tell you something.

FV: Aren't there people in there doing that?

HS: Ah, once in awhile you'll sit down and some guy will be doing it, and you say to yourself, you know it's a sexy movie but do I want some guy shooting his love gunk all over me?

FV: (Laughs)

HS: I mean, it's indecent. What I would do is I'd go watch the movie, then when I go home I would masturbate. I'd be too embarrassed to masturbate there in the theatre.

FV: Yeah.

HS: I have a certain civility about me.

FV: I see.

HS: A certain "Je ne sais quoi."

RQ: Let me ask you another question.

FV: I don't know what?

HS: Yeah.

FV: He does. I don't what.

HS: I have a certain, I don't know what.

RQ: But ah.

FV: But you also stop masturbating when your wife comes in the room.

HS: Of course.

RQ: So he doesn't do it in front of anybody.

HS: Right.

FV: You don't do it in front anybody even though.

HS: Well, that's for a very personal reason, I don't want my wife to think I'm some kind of pervert.

* * *

FV: But did you ever think of it. If you said watch me.

HS: Eddie maybe I don't want a personal therapy session on the air. OK

FV: Maybe if you said watch me, you would not have to

RQ: It would cure them?

HS: No. I don't want to be cured. Masturbation is a dirty act. It should be done alone. That's why they call it masturbation.

FV: No. No. No. It just means to do, you know.

HS: I know what it means I'm a master at it. You'd think that if I practice at something that much, I'd better know what it means.

FV: You are the master bader. Yeah.

HS: My point is, for a guy to go to an X-rated theater and masturbate, even though it's an x-rated theater,

RQ: And so what if everyone else is doing it.

HS: To me its an act of perversion.

FV: But what are 6 vice cops doing there in the middle of the afternoon?

RQ: Looking for him.

HS: Regardless of the fact that there were guys there, the cops are doing their job.

FV: And, they waited until the movies were over, that was the thing.

RQ: They were polite.

FV: Why didn't they take them inflagrante?

HS: They needed evidence.

RQ: Inflagrante?

FV: Yes, why didn't they take them inflagrante? Why didn't they do it while they were spewing forth their precious bodily fluids.

HS: Would you like me to spew forth and have you grab me? No.

FV: Why didn't they get a baggie out and take evidence.

* * *

November 26, 1991

[Discussion of Santa fondling two children]

HS: The kids sit on the lap. But, how does the guy make the move in front of all these people.

RQ: Here's what happened. They don't tell me specific incidences. But he was booked after parents of two eight year olds told police that the Spybick (?) fondled the boys' genitals over the week end.

* * *

HS: Ho ho ho. You want some toys my son? Play with Mr. Goose.

* * *

RQ: When you get the kid on your lap and you're in that Santa suit. I suppose with all the fur and everything, your hands can sort of disappear. Ya know. Nobody can actually see what you're up to.

HS: Yes son there's a Santa. And he's got a boner.

* * *

HS: Have you seen Mark's penis yet?

MV: No, have you.

HS: Oh yeah. I paid $1500. I paid $1000 to see it. But I saw it.

MV: What does that make Mark.

HS: For the hungerthon.

MV: What does that make Mark if you gave him $1000 to drop his pants.

HS: He's a whore.

HS: Mark Chernoff is such a big pussy.

RQ: Why are you saying that now?

HS: Because he won't say WNEW sucks either. He does not have eye of the tiger either.

* * *

RQ: This doctor has found a way to lengthen the penis.

WO: No. We had the girthing before

RQ: No. This isn't girthing.

HS: Go ahead because I'm there. I would lengthen my penis in two seconds flat. You know why.

WO: Even if they had to kinda take it apart and put those braces on and twist on it every day.

HS: Nope. Is that what they have to do?

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RQ: What he says here is that they have to take now I don't know. They cut two ligaments.

HS: Go ahead.

WO: Ouch

RQ: The doctor says "I discovered that by cutting two ligaments, I could extend the penis."

HS: How long?

RQ: He tried it on a peasant son. This is in China of course.

WO: The peasants, we can practice on them. Where's Dr. Mengele when you need him.

RQ: Yeah, just get me one of those peasant over there.

HS: Yeah, just get me one of those peasants boys, they won't miss their penis.

RQ: The operation was such a success the man married in 1986 and had a child a year later.

HS: So let me get this straight. By cutting the two little ligaments in my penis it will allow it to stretch out.

RQ: That's what this guy says. So they start off the article talking about this guy, Chin, whose in his hospital bed recovering from the operation.

WO: Oh, Chin. I so happy. I so happy. I marry you now

HS: Now my penis is an inch long.

WO: I so happy, you make me a woman.

RQ: They say the doctor comes in, he whips back the sheets, whipped out a ruler and measured Mr. Chin's penis.

HS: Where are you getting this, by the way?

RQ: This is from a Canadian paper. Somebody faxed it in to me.

HS: All right I'll go along with that.

WO: Did they check the ruler. Which ruler did they use before and which ruler did they use after?

HS: You know what's amazing. The doctors in China are really amazing people they make your penis grow but the media really sucks. This is from a paper in Canada. The Chinese paper could not even get this out.

WO: No. No. They could not.

RQ: So when he put the ruler next to Mr. Chin, he yells out 9.5 centimeters.

HS: Eureka.

WO: Now what does centimeters that's like two inches.

RQ: Well what is 9.5 centimeters?

HS: Jackie knows that stuff.

MV: It's 2.54 cm per inch.

WO: So that's about 2 1/2

RQ: So were talking at least 4.

WO: 9. What?

RQ: 9.5.

MV: Yeah all right. Four.

HS: Four inches.

RQ: So, he was four inches,just laying there.

HS: Three and half inches can you handle that Eddie?

MV: Not wide enough.

HS: Not wide enough. That's the problem.

WO: Yes I'm looking for the devil's diesel rig. He has eighteen wheels coming at me.

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RQ: Mr. Chin said I wasn't normal. Before the operation, he had been just three centimeters long.

WO: What, that's about a inch?

HS: That's 0 inches in America

RQ: 1.18 inches

WO: Good on the calculations Jackie.

RQ: So he travelled 2,400 Km from his home.

WO: How many miles is that Jackie?

HS: Yeah, come on Jackie

MV: That's 4 1/2 million inches.

RQ: I love reading stories from foreign countries.

HS: Yeah km and cm

WO: Why can't we go metric. All the rest of the world is metric.

HS: Because we're too stupid to figure it out.

WO: Yes we're just too stupid. We go by Quarts and pecks and

HS: I have no problem with that

RQ: I'm happy with it.

HS: Let the rest of the world adjust to us, thank you.

RQ: Now, Mr. Chin says he can go and look for a wife. This was holding him back.

WO: You have to have a certain length before you can (unintelligible).

RQ: Apparently, in China, now the women have become more liberated and they have become more demanding sexually.

WO: Ooh. Don't bind my feet, don't bind my soul.

RQ: So if their husbands cannot satisfy them, they say bye bye. It's not the same way as it used to be.

WO: They're divorcing them?

RQ: Yeah. All these guys are rushing to Dr. Long the guys name is.

HS: Dr. Long? Ok. Let's go. That's not a real story.

RQ: Yeah. It is too.

WO: Someone made it up in a print shop and sent it to you and you bought it.

HS: Alright, what else is in the news, Robin? You just lost all credibility.

HS: Dr. Long. What about Nurse Vagina, is she working there too?

* * *

November 27, 1991

[Talk with Stacey Gillena (SG) from Knots Landing].

HS: Hey I've done stuff to myself and thought about you.

RQ: Oh dear.

SG: Oh my god. What have you done ?

RQ: Do you really have to announce that to a person?

HS: I'm not kidding. One time I was laying in bed, right? You understand that I go to bed early. In order to get to bed early, I have to have some kind of sex and my wife is not always available because she is putting the kids to bed. You understand what I'm saying.

SG: Wait how many kids do you have?

HS: Two. And what a mess you caused.

SG: Oh no. what?

HS: My whole bed was a messy.

SG: Oh shut up.

RQ: You are just awful.

HS: I'm being serious. So I'm thinking about you. So I meet you and you're just wearing like panties.

SG: You met me in your dream?

HS: Well no dream. I mean. I just conjured you up. If you know what I mean. I pictured you in thong panties. Do you wear those kind? do you wear G-string panties.

SG: Yeah, I do. I have them.

HS: I pictured you in G-string panties. And like no bra on. But just like, you know one of those little cut off t-shirts, Robin, where the top the breasts hang out the bottom a little bit.

SG: Gross what do you think I have, like, saggy breasts?

HS: No, no, no. It's so short, the top, that the bottom half of your breasts stick out.

RQ: You can't help it.

SG: Oh. Got it. Got it

HS: And you started coming on to me and we were making out and then you I did everything to you. But I mean everything.

RQ: This all happened in how many seconds?

HS: It just takes me like a minute or two.

RQ: And all of this was going on.

HS: I could not concentrate on her the whole time. It has to be someone I've been with.

RQ: Oh I see.

SG: Now. What now. I did stuff to you or you did stuff to me?

HS: I did stuff to you the whole time. You were pretty, actually lazy in bed.

* * *

HS: You ever bang a guy during a love interest scene?

SG: You mean really?

HS: Yeah.

SG: No.

RQ: Does it ever lead to any love off-screen though?

HS: Yeah, does a guy ever get aroused? Cause I know if I did a love, there would be no room on the screen for my boner. They would have to throw me right out. Right, Robin?

RQ: That's right.

HS: Robin knows, Robin just had her face. Never mind where her face was.

HS: But. Man you are really cute.

SG: Lets do it Howard. I'm going to talk to the producers ya know. It can be like an abusive kind of thing, where you like come in, you rough me up a little bit.

HS: Ya know what I do. I tie you to my radiator and stretch you.

SG: Cool. I love it.

HS: That would be so cool.

* * *

HS: Nicolet walks like Harry is slamming her too hard. Bowlegged or something this year. You know what I'm talking about, Robin? Have you seen it all?

RQ: I haven't seen it.

HS: I swear to god, you think this guy has got the big.

RQ: Oh dear.

HS: The big hot beef injection, 'cause I'm telling you, you could be the new sex symbol on the show.

* * *

HS: Talk to your producer and see if I can't either bang you or the black chick. Be just a one shot deal. I come on. I'll do that show. I've been approached by every show since we got on in Los Angeles. I would do that show. I'm this disc jockey. And one of you falls in with me. I tie you up to my radiator and stretch you out.

* * *

HS: Look at this guy, he sells the advertising time.

MV: Yeah.

RQ: He's like a one-man band.

HS: He writes all the articles for the magazine, do you have a broom in your ass so you sweep up too? I can just picture him, like, taking pictures with a broom in his ass and like typing.

RQ: Typing and sweeping.

HS: Squeezing his cheeks together. Get the place cleaned up before the Colins(?) come in.

* * *

December 5, 1991

RQ: A state health department panel has revoked the license of a 61 year old Brooklyn doctor who it determined had masturbated behind a patient's back while he was examining her.

HS: Really. So, in other words, you're telling me that if your a doctor you're not allowed to masturbate behind anyone's back while you're examining her.

RQ: Apparently not. I don't know that they had made that clear before.

HS: I know guys who went to medical school, they never once really said that you can't.

* * *

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HS: These are guys who studied their whole lives. And who really did not have much social contact. They were busy planning for a medical career. You don't learn all the social amenities. You don't know you're supposed to not masturbate. You could make that argument. These guys never dated a lot and now all of a sudden they've got naked women and stuff in their offices. It's hard not to masturbate.

RQ: Let me just say this, the doctor, Harold Mendelbaum.

HS: Harold Mendelbaum, very proud of yourself Mr. Mendelbaum?

RQ: He says that he was not doing what they have accused him of. He has Zprostatitis.

HS: Well I've had that, so I know what he's talking about.

RQ: He's suffered from a prostate problem that made him involuntarily secrete urine.

MV: Oooh.

HS: But do you have to do that in front of the patients?

RQ: Yeah couldn't you leave the office? Well the panel found him to be not credible and they found his testimony contrived, inconsistent and false.

HS: You know. Seriously if you were going to put me on the stand, I could come up something better than that. You got to understand something, I ah. Wash my penis, I sterilize my hands, my feet and my penis before I examine my patients. And, if you think that's wrong, ladies and gentlemen, you're out of your mind. Because there's lots of disease on penis. And so I scrub up my penis and if you interpret that as masturbation ladies and gentlemen, then fine, I hope your doctor doesn't wash his penis before he operates on you. Thank you ladies and gentlemen, good night.

RQ: The 29 year-old Manhattan business woman who made these accusations, says that Mendelbaum held a stethoscope to her back with one hand for five minutes, while she took deep breaths.

HS: Hey Jackie didn't Mendelbaum work on your feet.

MV: Son of a gun.

RQ: She had been suffering from a cough. And became unnerved when she noticed that he was breathing heavily and quickly, and then heard his gown rustle. Why was he in a gown.

HS: Why is his gown called Russell? Who names their gown?

RQ: He shuddered, she said, and when she turned her head, she said she saw him picking up his pants.

HS: This is not that unusual. When I was young I had a doctor who took a dump on that white paper.

RQ: Oh stop it.

HS: Oh yeah

RQ: Then the doctor moved to the back of the room wiped himself off with a towel and left the room.

HS: I'm disgusted.

RQ: He's married with three children. Oh dear.

* * *

KLSX-FM December 5, 1991 Page 19

December 6, 1991

HS: There are people who would do anything to get on TV.

RQ: Yeah, but as a blue dot? (Laughs)

HS: Yeah, but it's a start. You know what I mean. It's showN business.

RQ: You know they could sit there and dodge, so that they could.

HS: Yeah, I don't know, I'm just very nervous about TV in general. You know what I mean? People, people's desires to get on. I've seen people light their penises on fire to get on TV.

RQ: That's true.

* * *

HS: I'll tell you about the Hollywood Walk of Fame, if I go to Hollywood again, I'm going to take a dump on Rick Dees' star. (Laughter) Right. Thank you Carol. I'm going to take, does her laugh annoy you?

RQ: It just breaks your concentration.

HS: Yeah, yeah, it's.

FV: I'm sorry, I won't laugh.

HS: No, no. I'm just kidding. You're very beautiful, believe me. Any guy would want to get his hands on you, and that's the important thing. If, no seriously, that's what I will do.

RQ: You're going to take a dump. HS: Yep, I'll tell you what, if California, if Los Angeles makes me number one, they take our show and give us the number one slot, I will take a dump on Rick Dees' star.

RQ: You will not.

HS: That's what I'm saying. What do you think of that?

RQ: I don't think you're going to do it.

HS: And I'll wipe.

RQ: Like get rid of this tape and forget about it.

HS: I will wipe my ass with Jay Thomas' star. (Laughter) What do you think of that, Robin? I'm making that vow right now.

RQ: I don't want to be there when you do this.

HS: I'm doing it. You are going to be there.

RQ: No way.

HS: I'm going to take a dump on Jay Thomas' star and Rick Dee's star.

* * *

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-360

In the Matter of

Regulation of International Common Carrier Services — RM-7578

REPORT AND ORDER

Adopted: October 8, 1992; Released: November 6, 1992

By the Commission: Commissioner Quello concurring and issuing a statement; Commissioners Marshall and Duggan issuing a joint statement.

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I. INTRODUCTION

1. On January 10, 1992, we released a Notice of Proposed Rule Making to modify our current policy that treats foreign-owned U.S. common carriers as dominant in their provision of all international services to all foreign markets.[1] We proposed to regulate U.S. international common carriers, whether U.S.- or foreign-owned, as dominant only on those routes where their foreign affiliates have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services and facilities in the foreign market. We adopt this general regulatory policy, with certain modifications, for U.S. international resellers and facilities-based carriers.[2] We believe this action will provide significant consumer benefits, relieve U.S. carriers from unnecessary regulatory burdens, and continue to protect U.S. carriers from discrimination in access to foreign markets.

II. BACKGROUND

2. We last reviewed our Title II rate and entry regulation of U.S. international common carriers in 1985.[3] In the *International Competitive Carrier* proceeding, we concluded that we should streamline regulation of those U.S. international carriers that face effective marketplace competition and do not have market power.[4] We declined to adopt such streamlining for the provision of certain international services by particular carriers, including AT&T in its provision of international message telephone service (IMTS)[5] and foreign-owned U.S. carriers[6] in their provision of all international common carrier services. We maintained full Title II regulation of foreign-owned U.S. carriers because of our concern that their foreign parents had the ability and incentive to deny unaffiliated U.S. carriers operating agreements and to act in concert with their U.S. affiliates to discriminate against unaffiliated U.S. carriers in the terms and conditions of access to foreign markets.[7]

3. We initiated the instant proceeding in light of the progress that has been made to date by U.S. carriers in obtaining operating agreements, our desire to reduce regulation where the public interest permits, and our concomitant goal of encouraging competitive entry in foreign markets.[8] We noted with favor the movement towards privatization of foreign telecommunications entities and the significant telecommunications investments made by U.S. companies in other countries since 1985. At the same time, we observed that the need to ensure nondiscriminatory treatment of U.S. carriers in foreign markets applies equally to those markets where a U.S.-owned company acquires telecommunications facilities and services. The Notice therefore proposed to change the Commission policy that imposes dominant carrier regulation based only on the existence of an ownership interest in a U.S. carrier by a foreign telecommunications entity, and instead to impose

such regulation in those instances where there is a substantial possibility of anticompetitive effects on the U.S. international service market.

III. DISCUSSION

4. In this decision, we adopt our general proposal to regulate a U.S. international carrier, whether U.S. or foreign-owned, as dominant only on those routes where a foreign affiliate of the carrier has the ability to discriminate in favor of its U.S. affiliate in the provision of services or facilities used to terminate U.S. international traffic.[9]

5. In order to implement our modified regulatory policy, we adopt a definition of affiliation that focuses on common control of the U.S. carrier and its foreign affiliate; a framework for classifying U.S. international carriers and assessing the market power of their foreign carrier-affiliates; a certification requirement to protect against third-country leveraging of foreign market power; and a presumption of nondominant regulation for those U.S. carriers that merely resell the international switched services of U.S. facilities-based carriers with which they are not affiliated. We additionally adopt a streamlined grant procedure for certain resale applications and requests to modify a carrier's regulatory status.

6. The record demonstrates that our current international dominant carrier policy is overbroad, unnecessarily burdensome and may be detrimental to competition.[10] By redirecting regulation to those instances where a relationship between a U.S. international carrier and a foreign carrier may present some substantial risk of anticompetitive conduct, we promote competition in the U.S. international service market by reducing the costs of entry and operation, while continuing to protect unaffiliated U.S. carriers from discrimination by foreign carriers.[11] We recognize the concerns of AT&T and MCI that significant obstacles remain to achieving full and open competition in the provision of telecommunications services at the foreign end.[12] We agree that the long-term solution to foreign market power, which can be abused with or without a U.S. affiliate, is greater liberalization in foreign markets.[13] We do not agree, however, that our regulatory objective to promote competition for the benefit of U.S. consumers is well-served by retaining dominant carrier regulation in circumstances where a carrier will not be able to exercise or benefit from market power. Moreover, we note that our dominant/nondominant regulatory analysis occurs only after we have concluded that a particular carrier should be authorized to provide international service in the U.S. market.

7. USTR, AT&T, Sprint and CWA have urged the Commission to avoid action in this proceeding that would grant unilateral and uncompensated concessions to foreign countries.[14] We believe the steps we are taking here to more precisely tailor our regulatory scheme to meet desired public interest objectives are fully consistent with these requests.[15] We have advised the Executive Branch of our decision and will continue to support its efforts to achieve foreign market liberalization.

A. Definition of Affiliation

(1) The Notice

8. The Notice proposed to treat a U.S. carrier as an affiliate of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common control with a foreign carrier. We also requested comment on including within the definition of affiliate any U.S. carrier: (1) that is collectively controlled by more than one foreign carrier; or (2) whose foreign carrier investment exceeds a given benchmark that may fall short of control. Regardless of the option adopted, the Commission proposed to enforce the affiliation standard by requiring each Section 214 applicant to: (1) certify whether it is affiliated with a foreign carrier in the destination market; and (2) submit ownership information identifying the U.S. carrier's principal stockholders or other equity holders and any interlocking directorates.[16]

(2) Positions of the Parties

9. The majority of parties that support the Notice also support our tentative conclusion that control is the proper standard for triggering a cognizable affiliation between a U.S. and a foreign carrier.[17] CWCI, which otherwise supports the Notice, and AT&T, which opposes it, disagree with our proposal to focus solely on control as the measure of a carrier's incentive to participate in discriminatory conduct.[18] They argue that virtually any ownership interest between carriers creates financial incentives for the carriers to act in concert to the detriment of unaffiliated carriers. DOJ counters that, absent a controlling interest by a U.S. carrier in a foreign carrier, the U.S. carrier would not have the ability to use the foreign carrier's services or facilities to favor itself.[19] On the other hand, DOJ is concerned that a non-controlling ownership interest by a foreign carrier in a U.S. carrier could give the foreign carrier a financial incentive to use the bottleneck facilities it controls to discriminate in favor of its U.S. affiliate in some circumstances.[20]

(3) Discussion

10. We affirm our tentative conclusion that control is the proper standard for determining affiliation for purposes of deciding whether a U.S. common carrier should be regulated as dominant or nondominant in its provision of U.S. international service. We therefore adopt our proposal to treat a U.S. carrier as an affiliate of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common control with a foreign carrier. In adopting this standard, we recognize the concern that a less-than-controlling interest by a foreign carrier in a U.S. carrier could give the foreign carrier the financial incentive to favor its U.S. affiliate. Absent control, however, the foreign carrier would not be in a position to direct the actions of the U.S. carrier, and we think the U.S. carrier would be unlikely to risk sanctions by this Commission for participating in discriminatory conduct that violated Commission rules or policy, or any conditions of its Section 214 certificate. We note that U.S. carriers will be subject to ongoing reporting requirements that are designed to detect discrimination by foreign carriers or administrations in favor of specific U.S. carriers,[21] and we retain the option to impose or reimpose dominant carrier regulation on a particular carrier that is found to have engaged in anticompetitive conduct. DOJ notes as well that it has the authority to take enforcement

action under the antitrust laws in appropriate cases.[22] On balance, we do not believe the possibility of anticompetitive collusion poses enough of a threat to competition to impose dominant carrier regulation absent control by a foreign carrier of a U.S. carrier, particularly in light of the substantial competitive benefits that can result from lifting the burden of current regulation. We therefore decline to broaden the scope of our affiliation standard beyond that proposed in the Notice.

11. We also decline to adopt CWCI's suggestion that we craft an affiliation standard that would capture certain non-ownership arrangements between a U.S. and foreign carrier, such as co-marketing agreements for the provision of telecommunications services or joint ventures for the provision of non-telecommunications services. Although these arrangements could provide a financial incentive for carriers to act jointly in pursuit of marketing objectives, neither carrier has the ability to direct the actions of the other or to derive a direct financial benefit with respect to the other's telecommunications operations.[23] Moreover, the U.S. carrier would in all cases be subject to the ongoing regulatory requirements we impose on all U.S. international carriers. Therefore, submission and evaluation of such arrangements would appear to require an unnecessary expenditure of Commission and carrier resources. We accordingly conclude that these arrangements do not present a substantial possibility of anticompetitive effects such that these relationships need be addressed in the context of deciding whether to regulate a carrier as dominant or nondominant.[24] We will rely on our Section 208 complaint procedures and sanctioning authority to remedy any anticompetitive consequences that might arise once a carrier gains access to the U.S. market.[25]

12. We reject MCI's suggestion that we retain our current regulatory policy in light of the disagreement in the record as to the proper affiliation standard and how best to define control. We believe the legal test for control utilized in Sections 310(d) and 214(a) is workable and should be familiar to carriers, given their obligation to maintain control of their Section 214 and Section 309 authorizations.[26]

13. We thus adopt the Notice's proposal to assess control on a case-by-case basis, consistent with this Commission's experience in interpreting Sections 310(d) and 214(a) that control is best determined in this manner. We decline to adopt NTIA's suggestion that we adopt a "presumption of control" test based on a specific percentage of stock ownership.[27] We recognize that in some situations the use of a benchmark can provide certainty and expedite application processing. However, given the variety of ownership structures presented by public and private corporations, partnerships and joint ventures, it is difficult to craft an ownership benchmark that could be considered a reasonable presumption for all types of business arrangements in the context of deciding whether a carrier should be regulated as dominant or nondominant. Moreover, the need to examine the *de facto* control of a carrier's operations makes it unlikely that use of a benchmark will save significant time or resources for either the Commission or carriers. We will therefore require that applicants prepare their certifications consistent with Commission precedent under Sections 310(d) and 214(a) of the Act.[28]

14. To enforce our affiliation standard, we adopt the Notice's proposal to rely in the first instance on the submission of certifications and ownership information by applicants seeking Section 214 authorization.[29] While McCaw commented that it is unnecessary to require both a certification and ownership information, no other party that supported adoption of the control test opposed this aspect of our affiliation proposal. In these circumstances, we shall retain both requirements so as to better enable the Commission to ensure against the existence of *de facto* control.[30]

B. Market Power Analysis

(1) The Notice

15. We tentatively concluded in the Notice that traditional Title II regulation is warranted only for those routes where the U.S. international carrier has an affiliate with bottleneck control on the foreign end that could be used to discriminate against unaffiliated U.S. international carriers. We also tentatively concluded that the definition of bottleneck control should include a legally protected monopoly or monopoly in fact for the provision of telecommunication services or facilities, absent an effective regulatory regime to control the ability of the foreign carrier to discriminate.[31]

(2) Positions of the Parties

16. There is disagreement among some of the commenters about how best to assess whether the foreign carrier has bottleneck control, or market power, in the destination market. NTIA proposes a broad analytical framework for evaluating market power.[32] AT&T, which opposes any change in regulatory policy, argues that the Commission should equate market power with the protected position of the foreign carrier in its market.[33] BT is concerned that we will be unable to apply a market power test in a nondiscriminatory manner. It proposes that, if we adopt the test contained in the Notice, we consider whether the foreign affiliate has met certain objective criteria which can serve as benchmarks for assessing the effectiveness of government regulation.[34] GTE requests that we consider not only the ability of a foreign affiliate to discriminate, but also other factors, such as the presence or absence of incentives to discriminate and whether the foreign affiliate has a history of discriminating in favor of an affiliated U.S. entity.[35]

17. NTIA and DOJ oppose relying on the effectiveness of public regulation in the foreign market as a basis for exempting an affiliated U.S. carrier from dominant carrier regulation. DOJ suggests that foreign regulatory limitations could increase rather than reduce anticompetitive incentives to recover the lost value of the foreign carrier's monopoly. It also argues that a test that relies on effective public regulation could convey to foreign governments that the U.S. is indifferent to whether they merely strengthen their regulation of monopolies or introduce competition; and, as suggested by NTIA, could implicate foreign policy considerations committed to the Executive Branch.[36]

18. There is nearly uniform support for the proposal to limit our market power inquiry to those foreign affiliates that provide common carrier-type services or facilities.[37] There is less agreement on the issue whether to include within this class of services and facilities a foreign market's local or intercity access services and facilities. DOJ and NTIA suggest that foreign market power could be exercised by a carrier with a monopoly on any facilities that must be used to complete a call to a destination market.[38] Worldcom supports relying on our Section 208 complaint procedures to remedy discrimination in local or intercity

facilities, while TRICOM would establish a presumption that the status of services and facilities up to and including the international switch is dispositive of a U.S. carrier's regulatory status.

(3) Discussion

19. We emphasize that the market power decisions in this Order are relevant only for purposes of evaluating a carrier's status as dominant or nondominant. In this context, we adopt with certain modifications our basic proposal to regulate U.S. international carriers as dominant only on those routes where a foreign affiliate has the ability to discriminate in favor of its U.S. affiliate through control of bottleneck services or facilities in the destination market. We adopt the analytical framework proposed by NTIA to classify U.S. international carriers. We agree with NTIA that this framework should facilitate the task of determining a carrier's regulatory status by eliminating the need to make market power assessments for the majority of U.S. international carriers. Under the framework we here adopt: (1) carriers that have no affiliation with a foreign carrier in the destination market will presumptively be considered nondominant for that route; (2) carriers affiliated with a foreign carrier that is a monopoly in the destination market will presumptively be classified as dominant for that route; and (3) carriers affiliated with a foreign carrier that is not a monopoly on that route will receive closer scrutiny by the Commission.[39] We will place the burden of proof on any party, applicant or petitioner, that seeks to defeat the presumptions in the first two categories.

20. Carriers covered by the third category that seek to be regulated as nondominant bear the burden of submitting information to the Commission sufficient to demonstrate that their foreign affiliates lack the ability to discriminate against unaffiliated U.S. carriers. We expect carriers to address the factors that relate to the scope or degree of their foreign affiliate's bottleneck control, such as: the duopoly or oligopoly status in the foreign affiliate's country; and whether the affiliate has the potential to discriminate through such means as preferential operating agreements, preferential routing of traffic, exclusive or more favorable transiting agreements, or preferential domestic access and interconnection arrangements. They may also address whether public regulation in the destination market can be relied upon effectively to constrain the affiliate's ability to discriminate.[40] There would appear to be no substantial risk of discrimination, for example, where a U.S. carrier is affiliated with a foreign carrier that operates solely through the resale of an unaffiliated foreign carrier's services in a destination market that provides equivalent resale opportunities.[41]

21. In adopting the foregoing factors, we agree with DOJ and NTIA that we should not as a categorical matter exclude from our market power inquiry those foreign carriers that provide only intercity or local access services or facilities. Because there is the potential for discrimination through control of such facilities, depending on the service to be provided,[42] we believe the preferred course is to examine that potential in the context of particular showings by U.S. carrier-affiliates. We also agree with DOJ and NTIA that, for purposes of evaluating an affiliated U.S. carrier's regulatory status, we should not consider the effectiveness of public regulation in the foreign market as a stand-alone test for whether a foreign carrier has the ability to exercise market power in favor of its U.S. affiliate. This approach is consistent with the view that competition, not government regulation, is the most effective, and therefore the most desirable, solution to foreign market power.

22. We decline to adopt BT's proposal to apply dominant carrier regulation only where the foreign affiliate is not subject to government-imposed dispute resolution procedures and has not entered into multiple operating agreements, moved towards cost-based accounting rates, or adopted a policy of proportional return.[43] Compliance with these policies could suggest that the foreign carrier may not have the ability to discriminate against unaffiliated U.S. carriers; however, these policies are not exhaustive of the concerns that U.S. carriers express and that we share, such as the potential for discrimination in the quality and timing of interconnection, or the use of exclusive, indirect transiting arrangements.[44]

23. We appreciate the concern of BT and MCI that the regulatory scheme we are adopting will require administrative resources and a proper understanding of foreign markets. However, as noted by NTIA and DOJ, for at least the near term most of our decisions about whether to apply dominant carrier regulation should be clear-cut; either the U.S. carrier will have a foreign affiliate that is a monopoly in a particular country (as a result of government authorization or other market failure), or it will have no affiliate at all. There should be relatively few instances where a U.S.-based carrier will be affiliated with a foreign carrier subject to competition. Thus, the required analyses should not place an excessive burden on staff (or carrier) resources in the near term.[45] As NTIA observes, when foreign market competition emerges on a wider scale, which we believe is inevitable, it may be necessary to review the regulatory policy we adopt today.[46]

24. As a final matter, we affirm our tentative conclusion to limit our market power inquiry to those foreign entities that provide services and facilities in the destination market that are of the type the Commission regulates in the U.S. as common carriage.[47] Thus, we exclude from our dominant carrier regulations U.S. international carriers affiliated with foreign entities that, for example, provide or manufacture cable television services and facilities, enhanced (or value-added) services, or the hardware and software components that support the telecommunications infrastructure.

C. Third-Country Leveraging

(1) The Notice

25. Although we tentatively concluded in the Notice that our current policy was overbroad in applying dominant carrier regulation to U.S. carriers on unaffiliated as well as affiliated routes, we asked parties to commment on whether there was a substantial possibility that a U.S. carrier's foreign affiliate could successfully leverage its foreign market bottleneck into third-country markets where it has no bottleneck control. We also requested comment on whether the potential for such conduct could be offset by imposing additional traffic reporting requirements.[48]

(2) Positions of the Parties

26. The majority of commenters support our proposed route-by-route approach. DOJ considers it improbable that a U.S. carrier could benefit from anticompetitive conduct by its foreign affiliate in a third country where the affiliate either has no market power or no bottleneck facilities. AT&T and MCI, by contrast, provide several examples of

potential third country leveraging,[49] which other commenters suggest are purely hypothetical.[50] While AT&T opposes any change in our current dominant carrier policy, it suggested in its initial comments that we could require carriers seeking nondominant status on unaffiliated routes to certify that transit, third- country calling or other concession arrangements have not been negotiated and will not be used to benefit the U.S. carrier in its operation on the unaffiliated route.[51] DOJ supports and CWCI has no objection to use of such a certification; however, CWCI cautions that we not unwittingly prohibit legitimate transiting arrangements.[52] IDB, which argues that AT&T and MCI have more leverage than any small affiliated carrier, urges that we apply any certification requirement to all U.S. carriers.[53]

(3) Discussion

27. We cannot rule out the possibility that an affiliated U.S. carrier will attempt to gain an unfair competitive advantage on affiliated or unaffiliated routes through the negotiation of exclusive arrangements with foreign carriers or administrations. We therefore amend Part 63 of the Rules to require that Section 214 applicants with a foreign carrier affiliate in any market certify in each application filed with the Commission that they have not agreed to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the U.S. and any destination market served under the authority of their Section 214 certificates[54] and have not agreed to enter into such agreements in the future.[55] We define "special concession" as any arrangement that affects traffic or revenue flows to or from the U. S. that is offered exclusively by a foreign carrier or administration to a particular U.S. carrier and not also to similarly situated U.S. international carriers authorized to serve a given route. The certification will be viewed as an on-going representation to the Commission, and carriers will be required to inform the Commission if at any time the representations in their certifications are no longer true. Failure to so inform the Commission will be deemed a material misrepresentation to the Commission.[56]

28. We believe the certification approach has several advantages over the alternatives suggested in the Notice. Unlike the proposal to require affiliated carriers to file quarterly traffic reports for all routes served, the certification reduces regulatory burdens. At the same time, the certification requirement provides a strong disincentive for an affiliated U.S. carrier to collude with a foreign carrier to gain an unfair competitive advantage in the U.S. international service market.[57] We will not hesitate to undertake an enforcement action where we are presented with evidence that an affiliated U.S. carrier has entered into such an agreement or engaged in willful misrepresentation before this Commission by failing to disclose to the Commission any such prohibited arrangements. Indeed, we reiterate that we retain the option to impose dominant carrier regulation for all routes for particular carriers found to have engaged in anticompetitive conduct. Moreover, if necessary the Commission will initiate proceedings to revoke a carrier's Section 214 authorizations to operate in the U.S. market.

D. Regulatory Treatment of Resellers

(1) The Notice

29. The Notice proposed to apply our modified policy to U.S. facilities-based carriers and resale carriers alike. We tentatively concluded that it would be difficult to distinguish a carrier's regulatory status based on the means by which it provides U.S. international service. The Notice sought comment, however, on the potential for discrimination by a foreign carrier in favor of an affiliated U.S. carrier that is merely reselling IMTS.[58]

(2) Positions of the Parties

30. CWCI, GTE, McCaw, the British Embassy, BT, Worldcom and Sprint generally support regulating resellers as nondominant in the absence of an operating agreement and correspondent relationship between the reseller and foreign carrier. GTE, for example, notes that "it is the unaffiliated facilities-based carrier, not the reseller, that is negotiating the terms and conditions of interconnection with the foreign entity."[59] Commenting specifically on IMTS resellers, Sprint requests that we condition nondominant treatment of such resellers on the requirement that their foreign affiliates accept certain principles when acting as correspondents of unaffiliated U.S. international facilities-based carriers.[60] McCaw supports a route-by-route blanket exemption from dominant carrier regulation for "pure" IMTS resellers,[61] while CWCI and BT would also grant such an exemption to private line resellers.[62]

(3) Discussion

31. *Switched Service Resellers.* Given the substantial support in the record, we will presumptively treat as nondominant all U.S. international carriers, regardless of any foreign affiliations, that provide service on a particular route solely through the resale of the switched services (including IMTS) of a U.S. facilities-based carrier with which the reseller is not affiliated. We agree with the assessment of many commenters that the resale of an unaffiliated U.S. facilities-based carrier's switched services presents no substantial possibility of anticompetitive effects in the U.S. international service market, because the reseller's foreign affiliate is negotiating the terms and conditions of access to the destination market with an unaffiliated carrier on the U.S. end.[63] In order to favor its resale affiliate, the foreign carrier would have to reveal its intent and extend favorable treatment to the underlying U.S. facilities-based carrier. We consider it unlikely that the foreign affiliate would engage in discriminatory conduct under such circumstances.[64]

32. All affiliated switched service resellers will in any event be required to certify that they will not agree to accept any special concessions from a foreign carrier or administration.[65] This requirement, in conjunction with our Section 43.51 filing requirements, should provide sufficient protection against the *de minimis* risk of discriminatory conduct by a switched service reseller or its foreign affiliate.[66] Moreover, we continue to reserve the right to impose conditions on the Section 214 authorizations of an affiliated U.S. carrier where deemed necessary to remedy use of a foreign carrier's market power against U.S. carriers generally.

33. *Private Line Resellers.* We do not agree with CWCI that the same rationale for regulating an IMTS reseller as nondominant applies to private line resellers. CWCI argues

that no policy concerns are raised until and unless a U.S. carrier enters into a correspondent relationship with a foreign carrier for direct service.[67] However, when a U.S. carrier serves a foreign market through the resale of private line service, it must obtain from the foreign carrier(s) the foreign half circuits and any necessary local or intercity access facilities or services required to terminate U.S. traffic. Even if the Commission finds that there are equivalent resale opportunities in the foreign market,[68] a foreign carrier that owns or controls telecommunications facilities in the destination market may have sufficient market power to discriminate among U.S. carriers in provisioning and pricing. We are not prepared at this time to presume dominant carrier regulation unnecessary to govern the operations of U.S. private line resale carriers whose foreign affiliates own or control telecommunications facilities in countries that continue to restrict competition for facilities-based carriage.

34. We recognize that a U.S. resale carrier may provide service on a given route as both a switched service and private line reseller. For example, a U.S. resale carrier affiliated with a foreign carrier that owns telecommunications facilities in the destination market may provide IMTS or telex as a switched service reseller and private line service as a private line reseller. In such circumstances, we will regulate the U.S. carrier as nondominant for the provision of IMTS or telex but assess the bottleneck control of its foreign affiliate, based on the framework described in Section III.B. above, to determine the carrier's regulatory status for the provision of private line service. However, if the carrier subsequently requests authorization to supplement its IMTS (or telex) offerings on that route through the acquisition of facilities on the U.S. end, or through the resale of private line services, we will assess the bottleneck control of its foreign affiliate to determine whether the U.S. carrier may retain its nondominant status for the provision of IMTS (or telex).[69]

E. Streamlined Processing and Other Regulatory Reforms

(1) The Notice

35. The Notice did not propose any specific reforms of our application processing procedures. Rather, we sought comment generally on the public interest benefits of modifying our current dominant carrier policy, including the elimination of unnecessary regulation.[70]

(2) Positions of the Parties

36. NTIA, the British Embassy, BT, CWCI, IDB, and McCaw urge that we reexamine in this proceeding the current regulatory filing requirements that we impose on U.S. international carriers.[71] NTIA suggests that we retain only those filing and reporting requirements that are necessary to serve the goals underlying our regulatory classification scheme, while several of the parties offer specific proposals to reduce Title II filing and associated reporting requirements. The parties strongly support the grant of unopposed Section 214 applications within a specified timeframe.

37. By contrast, AT&T proposes that we adopt additional substantive requirements to govern the operations of affiliated carriers, particularly on those routes where they provide facilities-based, end-to-end service with their affiliates.[72] AT&T argues that we should impose such rules as: separate books of account; no joint ownership of transmission facilities; a requirement that the U.S. carrier use its affiliate's services only pursuant to its affiliate's published tariffs; and carrier compliance with cost allocation, customer proprietary network information and network disclosure rules. CWCI disputes that such safeguards have any relevance to the underlying concerns of this proceeding.[73] Sprint argues in its Reply that we should precondition any facilities-based entry by a foreign-owned carrier on the existence of "reciprocal/equivalent" market entry opportunities in that carrier's home market(s) by U.S. carriers.[74]

(3) Discussion

38. We adopt commenters' suggestions that we institute a streamlined procedure for processing certain Section 214 applications that are filed on or after the effective date of this order.[75] Specifically, we adopt a specified timeframe for processing those unopposed Section 214 applications that seek authority to resell the international switched or private line services of unaffiliated U.S. facilities-based carriers,[76] except where: (1) a private line reseller or its affiliate owns or controls telecommunications facilities in the destination country and thus may be subject to dominant carrier regulation consistent with our decision in this proceeding; or (2) the applicant proposes to resell private line service to a destination country for which the Commission has not determined as of the date of public notice of the resale application that equivalent resale opportunities exist between the U.S. and the destination country.[77]

39. We will place on public notice for 30 days a resale application that meets these requirements and is otherwise acceptable for filing. Unless a formal opposition is filed, or unless the Common Carrier Bureau contacts the applicant in writing to the contrary, the application will be granted 45 days after the date of public notice.[78] We will issue public notice of the grant on the next available list of actions taken by the Common Carrier Bureau. Commission issuance of public notice of the grant shall be deemed the issuance of Section 214 certification to the applicant, which may begin operating on the 46th day.

40. We require that resale applicants submit certain basic information to enable staff to identify those applications that are eligible for streamlined processing. Some of this information already is provided by resale applicants as a matter of course or pursuant to staff request, although Section 63.01 of the Rules may not clearly require that resellers submit such information. We therefore amend Section 63.01 of the rules specifically to require that resale applicants submit the following additional information in their Section 214 applications: (1) the type of service (switched and/or private line) that the applicant seeks authority to resell; (2) the name(s) of the U.S. carrier(s) and the specific FCC tariff(s) to be resold; (3) a certification as to whether the applicant is affiliated with the U.S. facilities-based carrier(s) whose services are being resold; and (4) where the applicant proposes to resell private line services, a certification as to whether an affiliated foreign carrier owns or controls telecommunications facilities in the destination country.

41. Several parties propose that we take certain additional steps to expedite further the processing of international Section 214 applications and initiation of service to the public. These proposals include committing processing staff to a timetable for resolving disputed applications, and adopting additional rules to deter parties from filing frivolous or "strike" petitions.[79] BT additionally requests that this Commission extend its forbearance rule

to international resellers.[80] For the most part, these proposals go beyond the scope of this proceeding, and we will not address them here. We will, of course, make every effort to ensure that applications are processed in the most timely manner possible. The streamlined procedures adopted in this proceeding for certain resale applications should further ensure expeditious processing.

42. In requesting that we adopt in this proceeding specific conditions to govern the facilities-based operations of affiliated U.S. international carriers, AT&T and Sprint raise complex, substantive issues that are beyond the scope of this Rule Making. The merits of their arguments are better addressed in the context of applications filed by the affiliates of several foreign carriers to provide facilities-based, end-to-end service with their affiliates.[81] AT&T also requests that we institute a "fast-track" complaint procedure as a general remedy where foreign carriers attempt to exercise market power to the detriment of U.S. interests. While we believe it is unnecessary to designate complaints of foreign market leveraging as "fast-track," all U.S. carriers and consumers should be assured that we intend to utilize our resources to act swiftly and forcefully to resolve and redress any complaints that a U.S. carrier has engaged in discriminatory conduct in collusion with a foreign affiliate.

F. Procedure for Modifying Regulatory Status of Certificated Carriers

(1) The Notice

43. The Notice proposed to amend Part 43 of the Rules to require all authorized U.S. international carriers affiliated with foreign carriers to provide a list of such affiliations within ninety days of the release date of the Report and Order adopted in this proceeding. We also proposed to require any authorized international carrier that subsequently becomes affiliated with a foreign carrier to notify the Commission within ninety days of the transaction.[82]

(2) Positions of the Parties

44. No party supporting the Notice objects to the proposed information collection requirements. However, several commenters urge us to make specific findings in this proceeding as to the proper regulatory status of particular carriers under the modified policy adopted in this order, or to adopt specific procedures automatically to adjust a carrier's status based on information submitted under our new Part 43 rules.[83]

45. In particular, BT, McCaw and the British Embassy urge us to determine in this proceeding that there is no substantial possibility of discrimination by United Kingdom service providers against unaffiliated U.S. carriers.[84] Sprint argues that its experience in seeking a U.K. license is inconsistent with BT's statements.[85] CWCI, which argues that its U.K. affiliate Mercury Communications, Ltd. does not enjoy equal access in the U.K., requests that we find in this proceeding that Mercury has no bottleneck control of services or facilities in the U.K. and has no ability or incentive to favor CWCI or any other U.S. carrier.[86] AT&T suggests that there is insufficient evidence in the record to determine that any particular U.K. carrier lacks the ability to act to the detriment of U.S. consumers and carriers.[87] MCI strenuously objects to consideration of any particular requests for relief in this proceeding,[88] including Worldcom's request that we grant immediate interim waivers to carriers who ultimately would be relieved of dominant carrier regulation under our modified policy.[89]

(3) Discussion

46. We decline to make any specific rulings as to the regulatory status of particular carriers for affiliated routes in this proceeding. We agree with AT&T and MCI that the record in this docket is not sufficent to make these rulings. We have adopted a decisional framework that we expect carriers specifically to address in support of a showing for nondominant status. Moreover, as MCI observes, the Notice did not specifically contemplate that this proceeding would provide a vehicle for resolving a particular carrier's regulatory status; thus, we believe that other parties may not have had sufficient notice that we might take such action in this docket.[90]

47. We will, however, adopt a streamlined procedure for U.S. carriers to modify their regulatory status from dominant to nondominant for unaffiliated routes or affiliated routes served solely through the resale of switched or private line services (as limited in paragraph 38 above). Similar to the proposal in the Notice, any foreign-owned U.S. international carrier found to be dominant prior to the effective date of this Report and Order may file a certified list indicating those routes that it is authorized to serve for which it does not have an affiliate on the foreign end. Such filings shall include the ownership information listed in Section 63.01(r) of the Rules. A carrier may also inform the Commission, by submitting a certification, of those affiliated routes for which it provides a particular service solely through the resale of the international switched or private line services of unaffiliated U.S. facilities-based carriers. Such an affiliated U.S. carrier must also provide the "no special concessions" certification discussed in paragraph 27 above. Where the carrier resells private line services, it must additionally be able to certify, and so certify, that its foreign carrier-affiliate does not own or control telecommunications facilities in the affiliated market for which nondominant treatment is sought.

48. We will place these filings on public notice and, unless a formal opposition is filed, or unless the Common Carrier Bureau contacts the carrier in writing to the contrary, the carrier's regulatory status will be adjusted from dominant to nondominant for qualified routes and services 45 days after the date of public notice.[91] Thus, a carrier that has been regulated as dominant for all international routes will be deemed nondominant for all routes for which it certifies it does not have a foreign affiliate or for which it may qualify as a nondominant reseller. If a carrier seeks to modify its regulatory status on an affiliated route for which it does not appear to qualify as a nondominant reseller, we will require that it submit a petition for declaratory ruling to do so. Alternatively, the carrier may request that we modify its status on an affiliated route in conjunction with a Section 214 filing for that route.

49. We also adopt our proposal to require that any certificated carrier that is or becomes affiliated with a foreign carrier notify the Commission within ninety days of the acquisition of such interest[92] and submit with its notification ownership information and a "no special concessions" certification. The U.S. carrier should also certify, where appropriate, that it provides a particular service on the affiliated route solely through the resale of the international switched or private line services of unaffiliated U.S. facilities-based carriers. Where the carrier resells private

line services, it should also certify whether or not its foreign affiliate owns or controls telecommunications facilities on the foreign end.[93] Unless the carrier qualifies for a presumption of nondominant regulation as a switched service reseller on the affiliated route (as described in paragraph 31 above), it will be classified and its regulatory status assessed according to the framework discussed in Section III. B (*see also* Appendix B, Sections 63.01(r)(7), 63.10 and 63.11). We will place the carrier's notification on public notice and, if we deem it necessary, we will by written order at any time before or after the submission of public comments impose dominant carrier regulation on the carrier for the affiliated route.[94]

IV. FINAL REGULATORY ANALYSIS

50. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This *Report and Order* adopts a number of the proposals made in the *Notice* to modify Commission regulation of U.S. common carriers in their provision of international service. Under the modifications adopted herein, most U.S. carriers will be classified as nondominant in their provision of international service on those routes where the carriers do not have foreign affiliates with the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck services or facilities on the foreign end. The Commission declined to make findings concerning the regulatory status of particular carriers in this proceeding. Finally, the Commission modified certain Section 214 procedures to facilitate the grant of resale applications. These actions respond to commenters' concerns that current policy subjects many carriers to undue regulation.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The NPRM offered a number of alternatives for each issue raised.

V. Ordering Clauses

51. Accordingly, IT IS ORDERED, pursuant to 47 U.S.C. Sections 151, 154, 157, 201-205, 211, 214, 218-220, 303 and 403, that the regulation of U.S. common carriers in their provision of international services shall be modified as set out above.

52. IT IS FURTHER ORDERED that the modified policy, and the rules set forth in Appendix B, regarding regulation of international common carrier services SHALL BECOME EFFECTIVE ninety days after publication in the Federal Register.

53. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

American Telephone and Telegraph Company (AT&T)

Atlantic Tele-Network, Inc. (ATN)

British Embassy

British Telecommunications plc (BT)

Cable and Wireless Communications, Inc. (CWCI)

Communications Workers of America (CWA)

GTE Service Corporation (GTE)

IDB Communications Group, Inc. (IDB)

MCI Telecommunications Corporation (MCI)

McCaw Cellular Communications, Inc. (McCaw)

National Telecommunications and Information Administration (NTIA)

Pan American Satellite (PAS)

US Sprint Communications Company Limited Partnership (US Sprint)

World Communications, Inc. (Worldcom)

Telepuerto San Isidro, S.A. (TRICOM)

Department of Justice (DOJ)

United States Trade Representative (USTR)

APPENDIX B

PART 63 -- EXTENSION OF LINES AND DISCONTINUANCE OF SERVICE BY CARRIERS AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. The authority citation for part 63 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended 47 U.S.C. 154. Interpret or apply sec. 214, 48 Stat. 1075, as amended; 47 U.S.C. 214.

Source: 28 FR 13229, Dec. 5, 1963, unless otherwise noted.

2. Section 63.01 is amended by adding paragraphs (k)(6) and (r) to read as follows:

Section 63.01 Contents of Applications.

* * * * *

(k) * * *

(6) If proposed facilities are to be acquired through the resale of the international switched or private line services of another U.S. carrier for the purpose of providing international communications services,

(i) the specific service and the type of service (switched or private line) that the applicant seeks authority to resell; and

(ii) the name(s) of the U.S. carrier(s) and the specific FCC tariffs(s) to be resold.

* * * * *

(r) A certification as to whether or not the applicant has an affiliation with a foreign carrier.

(1) The certification shall state with specificity each foreign country in which the applicant has an affiliation with a foreign carrier. For purposes of this certification:

(i) Affiliation is defined to include: a controlling interest by the applicant, or by any entity that directly or indirectly controls or is controlled by it, or that is under direct or indirect common control with it, in a foreign carrier or in any entity that directly or indirectly controls a foreign carrier; or a controlling interest in the applicant by a foreign carrier, or by any entity that directly or indirectly controls a foreign carrier.

(ii) Foreign carrier is defined as any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, *see* Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art. 1.

(2) In support of the required certification, each applicant shall also provide the name, address, citizenship and principal businesses of its 10 percent or greater shareholders or other equity holders and identify any interlocking directorates.

(3) Each applicant that certifies that it has an affiliation with a foreign carrier in a named foreign country shall additionally certify that the applicant has not agreed to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the U.S. and any foreign country which the applicant may serve under the authority granted under this part and has not agreed to enter into such agreements in the future.

(i) For purposes of this paragraph, and of sections 63.11(a)(2)(iii), 63.13(a)(4), and 63.14, "special concession" is defined as any arrangement that affects traffic or revenue flows to or from the U.S. that is offered exclusively by a foreign carrier or administration to a particular U.S. international carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route.

(ii) The special concessions certification required by this paragraph and by sections 63.11(a)(2)(iii) and 63.13(a)(4) shall be viewed as an ongoing representation to the Commission, and applicants/carriers shall immediately inform the Commission if at any time the representations in their certifications are no longer true. Failure to so inform the Commission will be deemed a material misrepresentation to the Commission.

(4) Each applicant that proposes to acquire facilities through the resale of the international switched or private line services of another U.S. carrier shall additionally certify as to whether or not the applicant has an affiliation with the U.S. carrier(s) whose facilities-based service(s) the applicant proposes to resell (either directly or indirectly through the resale of another reseller's service). For purposes of this paragraph, affiliation is defined as in paragraph (r)(1)(i) of this section, except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(5) Each applicant that certifies under this section that it has an affiliation with a foreign carrier and that proposes to acquire facilities through the resale of the international private line services of another U.S. carrier shall additionally certify as to whether or not the affiliated foreign carrier owns or controls telecommunications facilities in the particular country(ies) to which the applicant proposes to provide service (*i.e.*, the destination country(ies)). For purposes of this paragraph, telecommunications facilities are defined as the underlying telecommunications transport means, including intercity and local access facilities, used by a foreign carrier to provide international telecommunications services offered to the public.

(6) Each applicant and carrier authorized to provide international communications service under this part is responsible for the continuing accuracy of the certifications required by paragraphs (r)(4) & (5) of this section. Whenever the substance of any such certification is no longer accurate, the applicant/carrier shall as promptly as possible and in any event within 30 days file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided. This information may be used by the Commission to determine whether a change in regulatory status may be warranted under section 63.10.

(7) Each applicant that certifies that it has an affiliation with a foreign carrier in a named foreign country and that desires to be regulated as nondominant for the provision of international communications service to that country may provide information in its application filed under this part to demonstrate that its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the named foreign country. *See* section 63.10 of this part, Regulatory Classification of U.S. International Carriers.

(i) Such a demonstration should address the factors that relate to the scope or degree of the foreign affiliate's bottleneck control, such as:

(AA) the monopoly, oligopoly or duopoly status of the destination country; and

(BB) whether the foreign affiliate has the potential to discriminate against unaffiliated U.S. international carriers through such means as preferential operating agreements, preferential routing of traffic, exclusive or more favorable transiting agreements, or preferential domestic access and interconnection arrangements.

(ii) Such a demonstration may also address other factors the applicant deems relevant to its demonstration, such as the effectiveness of public regulation in the destination country.

3. Section 63.10 is redesignated section 63.15 and new sections 63.10, 63.11, 63.12, 63.13, and 63.14 are added to read as follows:

Section 63.10 Regulatory classification of U.S. international carriers.

(a) Unless otherwise determined by the Commission, any party authorized to provide an international communications service under this part shall be classified as either dominant or nondominant for the provision of particular international communications services on particular routes as set forth in this section. The rules set forth in this section shall also apply to determinations of regulatory status pursuant to sections 63.11 and 63.13.

(1) A U.S. carrier that has no affiliation with a foreign carrier in a particular country to which it provides service (*i.e.*, a destination country) will presumptively be considered nondominant for the provision of international communications services on that route;

(2) A U.S. carrier that has or acquires an affiliation with a foreign carrier that is a monopoly in a destination country will presumptively be classified as dominant for the provision of international communications services on that route; and

(3) A U.S. carrier that has or acquires an affiliation with a foreign carrier that is not a monopoly in a destination country and that seeks to be regulated as nondominant on that route bears the burden of submitting information to the Commission sufficient to demonstrate that its foreign affiliate lacks the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck services or facilities in the destination country. Such a demonstration should address the factors that relate to the scope or degree of the foreign affiliate's bottleneck control, including those listed in section 63.01(r)(7).

(i) For purposes of paragraph (a)(1)-(3) of this section, "affiliation" and "foreign carrier" are defined as set forth in Section 63.01(r)(1)(i & (ii), respectively.

(4) A carrier that is authorized under this part to provide to a particular destination country a particular international communications service, and that provides such service solely through the resale of an unaffiliated U.S. facilities-based carrier's international switched services (either directly or indirectly through the resale of another U.S. resale carrier's international switched services), shall presumptively be classified as nondominant for the provision of the authorized service. The existence of an affiliation with a U.S. facilities-based international carrier shall be assessed in accordance with the definition of affiliation contained in section 63.01(r)(1)(i), except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(b) Any party that seeks to defeat the presumptions in paragraphs (a)(1), (a)(2) and (a)(4) of this section shall bear the burden of proof upon any issue it raises as to the proper classification of the U.S. carrier.

Section 63.11 Notification required by U.S. international carriers that acquire an affiliation with a foreign carrier.

(a) Any carrier authorized to provide international communications service under this part that is, as of the effective date of this rule, affiliated with a foreign carrier, or that becomes affiliated with a foreign carrier after the date its authorization is granted, shall notify the Commission within ninety days of the effective date of this rule, or within ninety days of the acquisition of such interest, whichever occurs later. The certification shall state individually the country or countries in which the affiliated foreign carrier is authorized to provide telecommunications services offered to the public. It shall additionally specify which, if any, of the affiliated countries the U.S. carrier is authorized to serve under this part; what services it is authorized to provide to each such country; and the FCC File No. under which each such authorization was granted. For purposes of this section, "affiliation" and "foreign carrier" are defined as set forth in section 63.01(r)(1)(i) and (ii), respectively.

(1) The carrier should also file, where applicable, a certified list of those routes for which it has an affiliation with a foreign carrier (as defined in section 63.01(r)(1)(i) & (ii)) but for which it provides a specified international communications service solely through the resale of the international switched or private line services of U.S. facilities-based carriers with which the resale carrier does not have an affiliation. Such an affiliation is defined as in Section 63.01(r)(1)(i), except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(2) The carrier shall also submit with its notification:

(i) the ownership information as required to be submitted pursuant to section 63.01(r)(2);

(ii) where the carrier serves the affiliated route as a private line reseller, a certification as required to be submitted pursuant to section 63.01(r)(5); and

(iii) a "special concessions" certification as required to be submitted pursuant to section 63.01(r)(3).

(3) The carrier is responsible for the continuing accuracy of the certifications provided under paragraph (a) of this section. Whenever the substance of any certification provided under paragraphs (a)(1) or (a)(2)(ii) of this section is no longer accurate, the carrier shall as promptly as possible and in any event within 30 days file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided. This information may be used by the Commission to determine whether a change in regulatory status may be warranted under section 63.10. The carrier shall immediately inform the Commission if at any time the representations in the "special concessions" certification provided under paragraph (a)(2)(iii) are no longer true. *See* section 63.01(r)(3)(ii).

(b) Unless the carrier filing under paragraph (a) of this section qualifies for the presumption of nondominant regulation pursuant to section 63.10(a)(4), it should submit the information specified in section 63.01(r)(7) to retain its nondominant status on any affiliated route.

(c) The Commission will issue public notice of the submissions made under this section and, if it deems it necessary, the Commission will by written order at any time before or after the submission of public comments impose dominant carrier regulation on the carrier for the affiliated route based on the provisions of section 63.10.

Section 63.12 Streamlined processing of certain international resale applications.

(a) Except as provided by paragraph (c) of this section, a complete application seeking authorization under this part to acquire facilities through the resale of the international switched or private line services of another U.S. carrier shall be granted by the Commission 45 days after the date of public notice listing the application as accepted for filing.

(b) Issuance of public notice of the grant shall be deemed the issuance of section 214 certification to the applicant, which may commence operation on the 46th day after the date of public notice listing the application as accepted for filing, but only in accordance with the operations proposed in its application and the rules, regulations, and policies of the Commission.

(c) The streamlined processing procedures provided by paragraphs (a) and (b) of this section shall not apply where:

(1) the applicant has an affiliation, within the meaning of section 63.01(r)(4), with the U.S. facilities-based carrier whose international switched or private line services the applicant seeks authority to resell (either directly or indirectly through the resale of another reseller's services); or

(2) the applicant seeks authority to resell international private line services and a foreign carrier with which it has an affiliation within the meaning of section 63.01(r)(1)(i) & (ii) owns or controls telecommunications facilities in the country to which the applicant seeks authority to provide service (*i.e.*, the destination country); or

(3) the applicant seeks authority to resell international private line services to a country for which the Commission has not determined as of the date of public notice of the application that equivalent resale opportunities exist between the U.S. and the destination country; or

(4) the application is formally opposed within the meaning of section 1.1202(e) of this chapter; or

(5) the Commission has informed the applicant in writing, within 45 days after the date of public notice, that the application is not eligible for streamlined processing under this section.

(d) Any complete application that is subject to paragraph (c) of this section will be acted upon only by formal written order of the Commission, and operation for which such authorization is sought may not commence except in accordance with such order.

Section 63.13 Streamlined procedures for modifying regulatory classification of U.S. international carriers from dominant to nondominant.

(a) Any carrier that is authorized to provide an international communications service under this part and that was classified by the Commission as dominant for all international routes and services prior to the effective date of this rule due to the carrier's foreign ownership may apply to modify its regulatory status from dominant to nondominant for particular routes for the provision of international communications services in accordance with the provisions of this section.

(1) Any such carrier may file a certified list of those routes it is authorized to serve for which it does not have an affiliation with a foreign carrier on the foreign end. For purposes of this paragraph, "affiliation" and "foreign carrier" are defined as in section 63.01(r)(1)(i) & (ii), respectively. The carrier shall file with its certified list the ownership information required by section 63.01(r)(2).

(2) Any such carrier may also file a certified list of those routes for which it has an affiliation with a foreign carrier (as defined in section 63.01(r)(1)(i) & (ii)) but for which it provides a specified international communications service solely through the resale of the international switched or private line services of U.S. facilities-based carriers with which the resale carrier does not have an affiliation. Such an affiliation is defined as in section 63.01(r)(1)(i), except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(3) Any carrier filing a certified list pursuant to paragraph (a)(2) of this section that resells international private line services on a particular named route for the provision of a particular named service must also be able to certify, and so certify, that its foreign carrier-affiliate does not own or control telecommunications facilities on the foreign end of the route. For purposes of this paragraph, "telecommunications facilities" are defined as in section 63.01(r)(5).

(4) Any carrier filing a certified list pursuant to paragraph (a)(2) of this section must also provide the "special concessions" certification as required to be submitted pursuant to section 63.01(r)(3).

(5) Each carrier is responsible for the continuing accuracy of the certifications provided under paragraph (a) this section. Whenever the substance of any certification provided under paragraphs (a)(2) or (a)(3) of this section is no longer accurate, the carrier shall as promptly as possible and in any event within 30 days file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided. This information may be used by the Commission to determine whether a change in regulatory status on a particular route may be warranted under section 63.10. The carrier shall immediately inform the Commission if at any time the representations in the "special concessions" certification provided under paragraph (a)(4) of this section are no longer true. *See* section 63.01(r)(3)(ii).

(b) Except as provided in paragraph (c) of this section, a complete application submitted pursuant to the provisions of paragraph (a) of this section shall be granted by the Commission 45 days after the date of public notice listing the application as accepted for filing, and the carrier filing such application may begin operating on the 46th day in accordance with the regulatory status proposed in its application and with all rules, regulations, and policies of the Commission. The Commission will subsequently issue a written order ratifying the modification of the carrier's regulatory status.

(c) The streamlined processing procedure provided by paragraph (b) of this section shall not apply where:

(1) the application is formally opposed within the meaning of section 1.1202(e) of this chapter; or

(2) the Commission has informed the applicant in writing, within 45 days after the date of public notice, that the application is not eligible for streamlined processing under this section and must be supplemented as set forth in paragraph (d) of this section.

(d) Any party that desires to modify its regulatory status from dominant to nondominant pursuant to paragraph (a) of this section, but that does not qualify for streamlined processing under this section, must request such modification by filing a petition for declaratory ruling, or by including such request in an application filed under this part requesting authority to provide service on the particular route for which such modification is desired. Any such filing should include the information specified in section 63.01(r)(7).

Section 63.14 Prohibition on Agreeing to Accept Special Concessions.

(a) Any carrier authorized to provide international communications service under this part that has an affiliation with a foreign carrier shall be prohibited from agreeing to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the U.S. and any foreign country served under the authority of this part and from agreeing to enter into such agreements in the future. For purposes of this section, "affiliation" is defined as in section 63.01(r)(1)(i); "foreign carrier" is defined as in section 63.01(r)(1)(ii); and "special concession" is defined as in section 63.01(r)(3).

FOOTNOTES

[1] *Regulation of International Common Carrier Services, Notice of Proposed Rule Making*, 7 FCC Rcd 577 (1992) (*Notice*).

[2] This change in policy does not modify the dominant carrier status, for the provision of certain international services, of AT&T, Comsat, or U.S. carriers that provide international service for non-contiguous domestic points. *See infra* note 5.

[3] *International Competitive Carrier*, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (*International Competitive Carrier*).

[4] 102 FCC 2d at 821. Unlike their nondominant competitors, foreign-owned U.S. carriers regulated as dominant must: obtain Commission approval before adding circuits on certificated routes; file cost support with their tariffs, which are effective only after 45 (as opposed to 14) days notice; and report quarterly (as opposed to annually) on traffic and revenues. *See Notice*, 7 FCC Rcd at 577, 578.

[5] The Commission, however, did streamline regulation for AT&T's provision of non-IMTS (generally, telex, telegraph, and private line service). Further, the Commission in 1989 adopted incentive (or price cap) regulation for AT&T's provision of IMTS. Under incentive regulation, AT&T generally need not cost support its IMTS tariff filings. AT&T's IMTS tariffs may be filed on 14 days notice and are presumed lawful, provided they comply with our price cap rules. The only international tariffs that AT&T must submit with cost support on 45 days notice are those that implement a restructure or new service. We additionally note that we require AT&T to file its international traffic reports annually (not quarterly, as do the dominant, foreign-owned carriers).

[6] We defined as "foreign-owned" any U.S. carrier that is over fifteen percent directly or indirectly owned by a foreign telecommunications entity or on whose board of directors a representative of the foreign telecommunications entity sits. *International Competitive Carrier*, 102 FCC 2d at 842 n.74. We subsequently defined "foreign telecommunications entity" as including a telecommunications or telecommunications-related equipment manufacturer, equipment supplier, or service provider. *See Regulatory Policies and International Telecommunications, Report and Order and Supplemental Notice of Inquiry*, 4 FCC Rcd 7387, 7429 n.74 (1988).

[7] *International Competitive Carrier*, 102 FCC 2d at 842.

[8] *Notice*, 7 FCC Rcd at 580-81, 583, paras. 23-27, 40.

[9] We note that the scope of this Order is limited to addressing the question of how to regulate U.S. common carriers with foreign affiliations once they have been granted entry to the U.S. market. The Order does not address the question of entry standards for foreign-affiliated entities that apply for authority to operate in the U.S. market.

[10] *See generally* Comments filed by NTIA, DOJ, CWCI, McCaw, IDB, Worldcom, TRICOM, and PAS. All parties that commented in this proceeding are listed in Appendix A. We grant DOJ's request to accept its late-filed reply comments because this would serve the public interest and no party would be prejudiced. We also include in the record as informal comments correspondence submitted to the Commission by USTR on April 17, and September 10, 1992.

[11] No commenter, other than BT, argues that we should eliminate dominant carrier regulation as a means of protecting U.S. carriers from foreign market power. *See* BT Comments at 1-8.

[12] *See generally* AT&T Reply Comments and MCI Comments. *See also* NTIA Comments at 10-11. MCI also argues that the granting of additional operating agreements by foreign correspondents is not a proper basis for modifying our dominant carrier policy, because such action does not automatically translate into a competitive safeguard. MCI Comments at 8. However, our Notice recognized that encouraging the grant of multiple operating agreements, and discouraging market distortions through unequal interconnection and discrimination, were two independent reasons for imposing dominant carrier regulation on foreign-owned U.S. carriers in 1985. We tentatively concluded in the Notice, and here affirm, that the progress made to date in achieving the first of these objectives permits us to narrow the focus of our regulation to the second area of concern and impose dominant regulation on carriers to the extent their provision of service on particular routes presents a substantial possibility of anticompetitive effects on the U.S. international service market.

[13] *See* AT&T Reply Comments at 5; Sprint Reply Comments at 4-7; NTIA Comments at 9.

[14] Senators John C. Danforth and Bob Packwood submitted correspondence to the Commission on July 28, and October 6, 1992 expressing similar concerns.

[15] *See* Letter from Ambassador Carla A. Hills, United States Trade Representative, to Alfred Sikes, Chairman, FCC, dated September 10, 1992.

[16] *Notice*, 7 FCC Rcd at 582-83, paras. 35-38.

[17] *See generally* NTIA Comments at 6; DOJ Reply Comments at 14 n.19; McCaw Comments at 5; IDB Comments at 5; Worldcom Comments at 7-8; TRICOM Comments at 3-4.

[18] CWCI Comments at 10-12. AT&T Reply Comments at 11-14.

[19] AT&T concedes that a U.S. carrier "is more likely to require a controlling interest to use the foreign carrier's position to its unique advantage." AT&T Reply Comments at 14 n.**.

[20] DOJ Reply Comments at 14 n.19.

[21] *See* 47 C.F.R. Sections 43.51, 43.61, and 63.10(b) (1991).

[22] DOJ Reply Comments at 9 n.15.

[23] *See* AT&T Reply Comments at 13 n.** (co-marketing arrangements should be outside the definition of affiliation).

[24] Our affiliation standard does, however, include joint ventures that are created to own and operate a foreign telecommunications property. *See* DOJ Reply Comments at 14.

[25] CWCI additionally urges that we specifically include in our affiliation standard any contractual arrangement that may produce the opportunity and incentive for unlawful collusion between a U.S. and foreign carrier. However, our rules already provide us with an initial screening device to identify contractual arrangements that may raise competitive concerns. Section 43.51 of the rules, 47 C.F.R. Section 43.51 (1991), requires that all U.S. international carriers file certain contracts, including operating agreements and contracts that relate to the interconnection of international private lines, the interchange or routing of traffic, and matters concerning rates, accounting rates, or the basis of settlement of traffic balances. As CWCI observes, we have im-

posed our dominant carrier regulations on U.S. carriers because of such agreements. *See* CWCI Reply at 7-8 (citing *FTC Communications, Inc.*, 4 FCC Rcd 5633 (Com. Car. Bur. 1989), *recon. denied*, 5 FCC Rcd 3323 (Com. Car. Bur. 1990); *US Sprint Communications Co.*, 3 FCC Rcd 1484 (Com. Car. Bur. 1988)). We will continue to do so when the public interest requires.

[26] As IDB observes, all U.S. international carriers already are required under Section 214 of the Act to assess the locus of control of their operations, and to examine new investments to assure that an unauthorized transfer of control of their carrier certifications does not occur. IDB Comments at 6. *See also* Notice, 7 FCC Rcd at 582, para. 35 n.30.

[27] NTIA Comments at 16-17. *See also* Worldcom Comments at 7.

[28] No carrier disputes our tentative conclusion that there is ample precedent setting forth the circumstances that constitute control. *See Notice*, 7 FCC Rcd at 582 n.30 (citing *Rochester Tel. Corp. v. United States*, 23 F. Supp. 634, 636 (W.D.N.Y. 1938), *aff'd*, 307 U.S. 125 (1939) (definition encompasses every form of control, actual or legal, direct or indirect, negative or affirmative); *Benjamin L. Dubb*, 16 FCC 274, 289 (1951); *Intermountain Microwave*, 24 RR 983, 984 (1963); *Turner Broadcasting System, Inc.*, 101 FCC 2d 843, 848 (1985); *William S. Paley*, 1 FCC Rcd 1025 (1986), *recon. denied*, 2 FCC Rcd 2274 (1987), *aff'd sub nom. Fairness in Media v. FCC*, 851 F.2d 1500 (D.C. Cir.) (per curiam), *cert. denied*, 488 U.S. 893 (1988)). In response to the request of PAS, we clarify that our definition of control includes both positive and negative control.

[29] The required certification and ownership information is set forth in Appendix B, Section 63.01(r). If, for purposes of evaluating an applicant's certification or qualifications to gain market access to the U.S., additional ownership information is necessary, we will request the further information.

[30] *See* NTIA Comments at 17 n.35. *See Notice*, 7 FCC Rcd at 582, para. 36.

[31] *Notice*, 7 FCC Rcd at 581-82, paras. 29-33. The Notice stated our intent to include foreign market services and facilities that are used to deliver U.S. international traffic into the market, up to and including the international switch, and that are of the type that the Commission regulates as common carriage in the U.S. The Notice also requested comment on whether to extend our focus beyond the foreign international switch to include local and intercity access services and facilities. *Id.* at 581, paras. 29-31.

[32] NTIA Comments at 12-14.

[33] AT&T Reply Comments at 12-13. AT&T states that, in its simplest form, a protected market position provides the affiliated U.S. carrier with access to a customer base in the foreign market that is not available to unaffiliated U.S. carriers. According to AT&T, access to this customer base is particularly important in the provision of private line and custom network services, where the protected foreign carrier directs its customers to its U.S. affiliate. *Id.* at 13.

[34] BT Reply Comments at 7.

[35] GTE Comments at 6-7.

[36] DOJ Reply Comments at 11-13; NTIA Comments at 14-15.

[37] NTIA and DOJ specifically support our tentative conclusion that it is only affiliations with foreign providers of common carrier-type facilities and services that give rise to competitive concerns. NTIA Comments at 6; DOJ Reply Comments at 8.

[38] *See* DOJ Reply Comments at 8, n.13. *See also* NTIA Comments at 14.

[39] We believe this framework, in conjunction with our affiliation standard, responds to the concerns of ATN that we evaluate each situation on its facts. *See* ATN Comments at 6-11. We also note that ATN raises in this proceeding arguments that it raises in its Application for Review of the Common Carrier Bureau's *Order, Authorization and Certificate* in File No. I-T-C-90-153, 6 FCC Rcd 6529 (1991). We will address ATN's arguments in the context of that Application for Review.

[40] We do not intend this list to be all-inclusive of the factors that a carrier may submit in support of its showing or that a party may advance in opposition. Thus, for example, the effectiveness of public regulation is but one factor that a carrier may address in its market power showing and which we will weigh against other factors in reaching our decision.

[41] Under our international private line resale policy, *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, *First Report and Order*, 7 FCC Rcd 559 (1991), *recon. pending*, we require that U.S. carriers seeking to resell international private line service on a particular route demonstrate that the foreign country affords resale opportunities equivalent to those available under U.S. law. *See* 47 C.F.R. Section 63.01(k)(5). U.S. carriers that resell private line service may choose to establish a foreign counterpart to market or otherwise manage operations on the foreign end. While the U.S. carrier's foreign counterpart may fall within our definition of an affiliated foreign carrier, there appears to be no substantial risk of discrimination against unaffiliated U.S. carriers where the foreign carrier-affiliate does not own any telecommunications facilities in the foreign market.

[42] *See* NTIA Comments at 14.

[43] McCaw supports creating a rebuttable presumption of nondominance for carriers covered by the third category whose foreign affiliates satisfy BT's proposed criteria. McCaw Reply Comments at 6-7.

[44] We use the term "indirect transiting" to refer to the practice of switching U.S.-originating or -terminating traffic through one or more intermediate international exchanges. *See Implementation and Scope of the International Settlements Policy for Parallel Routes, Order on Reconsideration*, 2 FCC Rcd 1118, 1118 n.5 (1987), *modified on further recon.*, 3 FCC Rcd 1614 (1988). Section 43.51(a)(2) of the rules, 47 C.F.R. Section 43.51(a)(2), requires the filing of all indirect transiting agreements with the Commission.

[45] Although the Commission has previously expressed reluctance to undertake such evaluations of foreign market conditions, it is far from clear that retaining the current policy and entertaining waivers from carriers for particular routes, as AT&T and MCI propose, would reduce the administrative burden or the complexity of the issues raised.

[46] NTIA Comments at 13, n.27.

[47] To simplify the identification of these services and facilities in the context of a foreign market infrastructure, we adopt the classification used in the International Telecommunication Regulations: "telecommunication services offered to the public [and] the underlying international telecommunication transport means used to provide such services." Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art. 1. For purposes of applying our modified policy, we will refer to these services and facilities, which include intercity and local access services and facilities, as "telecommunications" services and facilities and to entities that are engaged in the provision of such services and facilities in foreign markets as "foreign carriers."

[48] *Notice*, 7 FCC Rcd at 583, para. 39.

[49] Both AT&T and MCI note, *inter alia*, the potential for transiting agreements (*see supra* note 44) that could be used by a U.S. carrier's foreign affiliate to benefit unfairly the U.S. carrier in its service operations to third countries. AT&T Comments at 24, MCI Comments at 3-4.

[50] CWCI Reply Comments at 10; IDB Reply Comments at 2-3; DOJ Reply Comments at 8-9, n. 14; McCaw Reply Comments at 5, n.11.

[51] MCI specifically opposes AT&T's initial proposal that we create a rebuttable presumption of lesser regulation for affiliated carriers on unaffiliated routes, provided they submit a "no special concessions" certification. MCI Reply Comments at 4 n.12.

[52] DOJ Reply Comments at 8-9 n.14; CWCI Reply Comments at 19.

[53] IDB Reply Comments at 9.

[54] Because switched service resellers may serve particular destination markets that are not specifically listed in their Section 214 applications or authorizations, we require that such affiliated resellers certify in their applications that they will not accept special concessions with respect to any destination markets they may serve under the authority of their Section 214 authorizations.

[55] We will also codify in Part 63 of the Rules this policy to prohibit U.S. international carriers with foreign carrier affiliates from agreeing to accept special concessions. We do not find it necessary to expand the scope of the certification requirement to cover all U.S. international carriers, as IDB requests. The record in this proceeding establishes the existence of a heightened risk of anticompetitive consequences as a result of affiliated carrier operations. We in any event have on numerous occasions specifically prohibited U.S. international carriers from negotiating exclusive arrangements with foreign carriers or administrations and retain the authority to do so in particular authorizations. *See, e.g., American Telephone and Telegraph Company, et al.*, File No. SCL-91-002, 7 FCC Rcd 134 (1992) (TAT-11 Cable Landing License).

[56] The certification provided by an affiliated carrier will also assist the Commission in its evaluation of the carrier's qualifications to operate in the U.S. international service market.

[57] The Commission has stressed on numerous occasions the fundamental importance of truthfulness and complete candor on the part of applicants, as well as licensees, in their dealings with the Commission. *See, e.g., Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 927 (Rev. Bd. 1991) (citing *Lebanon Valley Radio, Inc.*, 35 FCC 2d 243, 258 (Rev. Bd. 1972), *review denied*, 39 FCC 2d 1099 (1973), *rev'd on other grounds sub nom. Lebanon Valley Radio, Inc. v. FCC*, 503 F.2d 196 (D.C. Cir. 1984); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946)). *See also Pass Word*, 673 F.2d 1363 (1982), *cert. den.*, 459 U.S. 840 (1982) (common carrier revocation).

[58] *Notice*, 7 FCC Rcd at 582, para. 34.

[59] GTE Comments at 5-6.

[60] These principles relate to parity/nondiscrimination, uniform settlements, direct routing of traffic, movement towards cost-based accounting rates, and proportionate return traffic. Sprint Reply Comments at 3.

[61] McCaw defines such resellers as those that own no facilities. McCaw Comments at 11 n.26. *See also* British Embassy Comments at 3.

[62] CWCI Comments at 13 n.12. BT Comments at 7-9. *See also* McCaw Comments at 10-11.

[63] We emphasize that all U.S. carriers, in their provision of international service, are subject to the requirement that the terms, conditions, and rates under which they provide service be publicly filed and made generally available to similarly situated customers. *See Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, 6 FCC Rcd 5880 (1991); *Cable & Wireless Communications, Inc.*, File No. I-T-C-88-157, 7 FCC Rcd 4384 (Com. Car. Bur. 1992), *pet. for clarification pending* ; *Cable & Wireless Communications, Inc.*, File No. I-T-C-92-099, DA 92-1354, released September 30, 1992.

[64] While there is some possibility that the foreign carrier may seek to discriminate in this manner, we agree with CWCI that the potential for whipsawing of a U.S. facilities-based carrier by a foreign carrier exists regardless of whether the foreign carrier has a U.S. resale affiliate. Although the incentive to engage in such behavior may be heightened where there is a U.S. resale affiliate, such behavior is directly monitored by our requirement that all U.S. international carriers file their contracts pursuant to Section 43.51.

[65] *See supra* para. 27.

[66] While this certification may not accomplish precisely the same objectives that Sprint seeks in requesting that the reseller's foreign affiliate certify to its compliance with certain Commission policies, our decision recognizes that our jurisdiction flows to the U.S. carrier, not to its foreign affiliate. *See* CWCI Reply Comments at 19-20.

[67] CWCI Comments at 13.

[68] *See supra* note 41.

[69] Because the issue was not raised in the Notice, we will not revisit in this proceeding the Commission's decision in *International Competitive Carrier*, supra note 3, to divide the various international service offerings into two product markets: international message telephone service (IMTS) and non-IMTS (generally, telex, telegraph, and private line service). *But see* DOJ Reply Comments at 4 n.6. We also decline to revisit our 1985 decision to include non-IMTS services within our dominant carrier policies. GTE opposes the inclusion of non-IMTS on the basis that the central focus of the Notice is on IMTS and that foreign entities in general are very willing to deal with multiple U.S. carriers in the provision of non-IMTS. *See* also IDB Reply Comments at 7. GTE has not demonstrated to our satisfaction that there is no substantial possibility of foreign carrier discrimination against unaffiliated U.S. carriers in the provision of facilities and services used to terminate U.S. non-IMTS traffic.

[70] *Notice*, 7 FCC Rcd at 581, 583, paras. 26, 40.

[71] NTIA Comments at 18; British Embassy Comments at 2; BT Comments at 9, 16-18; CWCI Comments at 6; IDB Reply Comments at 11-12; McCaw Reply Comments at 7. *See also* MCI Reply Comments at 6 n.18. Worldcom also supports adoption of a streamlined grant procedure but urges that in doing so we not delay resolution of the core issues in this proceeding. Worldcom Reply Comments at 7.

[72] AT&T Comments at 20-23; AT&T Reply Comments at 6-7.

[73] CWCI Reply Comments at 17-18.

[74] Sprint Reply Comments at 4-7.

[75] This procedure will be similar to those the Commission has adopted for processing requests to register domestic receive-only satellite earth stations and to waive our International Settlements Policy. *See* 47 C.F.R. Sections 25.131(e) and 64.1001 (l)(1991). *See also* 47 C.F.R. Section 64.1001(h) (carrier notification procedure for simple reductions in accounting rates).

[76] We include in this class of applications those that seek authority to transfer control of an international resale entity or assign the international Section 214 authorizations of a resale entity.

[77] We note that these streamlined procedures are consistent with this Commission's approach to evaluating a carrier's qualifications to participate in the U.S. international service market. Streamlined processing will not apply to facilities-based appli-

cants; nor will it apply to private line resellers seeking to serve countries where there has been no finding of equivalent resale opportunities.

[78] *See* 47 C.F.R. Section 1.1202(e), which sets forth the requirements for formal oppositions.

[79] *See* comments cited *supra* note 71.

[80] BT Comments at 9-10.

[81] *See* Cable & Wireless Communications, Inc., File Nos. I-T-C-92-065 (application for Section 214 authority to acquire and operate facilities to the United Kingdom and beyond) and I-T-C-92-066 (application for Section 214 authority to acquire and operate facilities to Hong Kong and beyond); Telefonica Larga Distancia de Puerto Rico and LD Acquisition Corp., File No. I-T-C-92-116-TC (application for authority to transfer certificates of public convenience and necessity and amend submarine cable landing license).

[82] *Notice*, 7 FCC Rcd at 583, para. 41.

[83] *See* CWCI Comments at 16-17.

[84] BT Comments at 10-15, Reply Comments at 2-8; British Embassy Comments at 2; McCaw Comments at 7-8, Reply Comments at 8.

[85] Sprint Reply Comments at 7-8.

[86] CWCI Reply Comments at 5, n.3, Comments at 15.

[87] AT&T Reply Comments at 15-23.

[88] MCI Reply Comments at 8-9.

[89] Worldcom Comments at 9-10; McCaw Reply Comments at 7. Worldcom filed in conjunction with its comments in this proceeding a Request for Immediate Interim Relief from our dominant carrier policies and rules. *See* File No. I-S-P-89-005(A). Worldcom initially filed in 1989 a petition for declaratory ruling that it is not a dominant carrier, or alternatively, for waiver of the dominant carrier rules. Worldcom Comments at 2.

[90] We also decline to adopt BT's suggestion that we permit a foreign carrier to petition the Commission for a declaratory ruling as to its regulatory status without having to disclose the nature of any intended service. BT Comments at 17. As we stated *supra* para. 21, we believe that a foreign carrier's ability to discriminate in favor of its U.S. affiliate may depend upon the service its U.S. affiliate intends to provide. *See also supra* para. 33. We understand a carrier's desire to maintain confidentiality in certain aspects of its operations, particularly in the planning stages of a new service. However, all U.S. carriers are required to identify under Section 63.01 of the Rules the classification of the service they intend to provide, and the classification carriers use are generic as compared to the particular manner in which these services ultimately are provided.

[91] We will subsequently issue a formal written order to ratify the modification.

[92] We require that carriers report their acquisitions, and provide the "no special concessions" certification, regardless of whether they provide U.S. international service to the market in which their affiliate operates. We will permit carriers that have acquired an affiliated interest prior to the effective date of the Report and Order to submit their notification within ninety days of the effective date.

[93] Any carrier that is authorized to resell private line services in the U.S. and that has notified the Commission of the existence or acquisition of a foreign affiliation is under a continuing obligation to notify the Commission if and when a foreign affiliate subsequently acquires ownership or control of telecommunications facilities in a market served by the U.S. resale carrier. This information will enable the Commission to determine whether a change in regulatory status on a particular route may be warranted. Similarly, any carrier that is authorized to resell switched or private line services in the U.S. is under a continuing obligation to maintain the accuracy of its certification regarding whether or not the resale carrier is affiliated with a U.S. facilities-based carrier whose services it is reselling. *See* supra para. 40.

[94] We anticipate that this notification requirement will provide us with the information we need to determine whether to modify a carrier's regulatory status on a particular route, including a route served under a blanket authorization for multiple routes. Contrary to the concerns expressed by GTE Spacenet (*see* Comments at 4), the fact that a carrier's regulatory status on one such route may be subject to modification in no way suggests that the carrier's blanket authorization may become invalid.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: Regulation of International Common Carrier Services (CC Docket No. 91-360)

I am concurring with the majority in adopting this item. Today, the Commission is adopting a regulatory approach for classifying international carriers as either dominant or non-dominant. The route-by-route approach contained in this item should also be applied to AT&T, and I would have expanded the scope of this Order to cover AT&T. Pursuant to today's Order, foreign owned carriers operating in the U.S. can be regulated as non-dominant, while AT&T remains regulated as dominant. It is important to ensure that all carriers competing in the marketplace are provided with the opportunity to compete on a level playing field. I am also concerned that this item could increase the Commission's burden in reviewing complexed cases concerning whether individual foreign carriers have market power. In addition, it raises serious questions regarding the Commission's ability to enforce our regulations. I concur in this item with the understanding that the regulatory classification of specific countries and individual carriers will be subject to full Commission review.

JOINT STATEMENT OF COMMISSIONER SHERRIE P. MARSHALL AND COMMISSIONER ERVIN S. DUGGAN

Re: Regulation of International Common Carrier Services (CC Docket No. 91-360, RM-7578)

We are voting for this item for only one reason: its scope is so narrow that it should not hamstring U.S. negotiations on larger international telecommunications issues. Today's decision simply implements an improved regulatory scheme for determining whether an international common carrier operating within the U.S. should be regulated as dominant or nondominant. It does *not* address the question of under what circumstances foreign-owned carriers may be granted *entry* into the U.S. market. In short, this decision simply takes care of the regulatory details that will follow the larger, and much more significant, market entry question.

U.S.-owned international carriers and the United States Trade Representative have urged in this proceeding that the FCC not adopt regulatory policies that would undermine U.S. efforts to open foreign telecommunications markets to U.S. carriers. We share those concerns. Indeed, we would not support a decision that in any way limited the

possible negotiating positions of the U.S. in its efforts to open foreign markets. Therefore, we emphasize that today's decision does not implicate market entry standards for foreign carriers. Rather, the Order merely implements a uniform regulatory scheme the FCC can apply to all international carriers if and when they are granted entry into the U.S. market.

A concrete example should clarify the very limited scope of today's decision. Suppose a private line reseller from a foreign country seeks authority to provide services between the U.S. and its home country. The Commission's December 1991 *International Resale Order* sets forth the U.S. market entry standards that govern a foreign private line reseller's ability to enter the U.S. marketplace. Specifically, *equivalent resale opportunities* for U.S. carriers must exist in the foreign market in order to grant the foreign carrier access to the U.S. market. If such equivalent market opportunities exist and if the foreign carrier is otherwise qualified to be a Commission licensee, then, *and only then*, is the FCC confronted with the issue of *how* to regulate the foreign carrier. Today's decision establishes the rules as to how the carrier would be regulated -- either as a dominant or nondominant carrier -- in our market. Of course this decision does not address, nor should it, the question of appropriate market entry standards for foreign facilities-based carriers.

We are eager to eliminate all unnecessary regulatory burdens borne by foreign-owned international carriers, as well as unnecessary burdens imposed on the FCC itself. Most foreign countries, however, have not yet liberalized and privatized their own telecommunications markets, and competitive opportunities for U.S. companies abroad remain limited. Further, accounting rates with foreign telephone administrations continue to be extremely high. Indeed, despite our best efforts to the contrary, the total 1991 U.S. international settlement payments -- payments financed by U.S. businesses and consumers -- increased by 21% over 1990 levels. Even worse, the 1992 settlement payment is expected to increase to more than $4 billion.

We remain committed to a regulatory course that will spur competition and reduce costs in the international telecommunications marketplace. Already the U.S. has the most open and advanced telecommunications market in the world. But the U.S. controls only one end of the communications pipeline. Therefore, absent concerted deregulatory efforts abroad, we believe it is unwise and antithetical to the public interest to further streamline or in any way modify entry standards for foreign-owned international carriers seeking access to the U.S. market.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 83
F.C.C. No. 38	

ORDER

Adopted: November 5, 1992; Released: November 5, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On October 23, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective November 6, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 38 for AT&T Accunet Spectrum of Digital Services. Inter Office Channels (IOCs), Accunet T1.5 and T45 IOCs, Local Channel Service, and associated components.

2. On October 30, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 83.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 38, Contract Tariff Transmittal No. 83 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 38, Contract Tariff Transmittal No. 83, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 6, 1992

U S WEST COMMUNICATIONS, INC. AND EMERY TELEPHONE JOINT PETITIONS FOR WAIVERS OF PART 36 APPENDIX GLOSSARY AND OF PRICE CAP RULES (CFR SECTIONS 61.41(c), AND 69.3(e)(11)) OF THE COMMISSION'S RULES (AAD 92-88)

Comments: November 23, 1992
Reply Comments: December 7, 1992

In August 1992, US West Communications, on behalf of its operating affiliates, The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) and Emery Telephone Association (Emery) filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix Glossary of Part 36 of the Commission's Rules. This waiver would allow US West and Emery to adjust their Utah study area boundaries in light of the proposed sale of the Green River Exchange from US West to Emery. Subsequently, Emery filed a petiton for waiver of the Price Caps rules found at CFR 61.41(c) and 69.3(e)(11) of the Commission's rules to excuse Emery from participation in price cap regulation.

Parties may file comments on these petitions no later than **November 23, 1992.** Replies should be filed by **December 7, 1992.** Comments should reference AAD 92-88. A copy of each pleading should be sent to Pat Shipley, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1990 M Street, Suite 640, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from DCC.

For further information contact Pat Shipley at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-260

In the Matter of

Implementation of the
Cable Television Consumer
Protection and Competition
Act of 1992

Cable Home Wiring

NOTICE OF PROPOSED RULE MAKING

Adopted: November 5, 1992; Released: November 6, 1992

Comment Date: December 1, 1992
Reply Comment Date: December 15, 1992

By the Commission:

I. INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 became law.[1] Under the Act, this Commission must, *inter alia*, prescribe rules regarding cable home wiring within 120 days after enactment [February 2, 1993]. We adopt this Notice of Proposed Rule Making in order to prescribe such rules within the mandated timeframe.

II. DISCUSSION

2. Specifically, Section 16(d) of the Cable Act of 1992 requires us to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber."[2] The legislative history appears to favor the Commission fashioning rules that would enable the subscriber to acquire cable home wiring upon termination of service.[3] We seek comment on how we should fashion rules implementing this approach or any alternative approach consistent with congressional intent.[4] On the one hand, Congress indicated its desire both to protect terminating subscribers from unnecessary disruption and expense caused by removal of internal wiring [5] and to foster multichannel service competition.[6] On the other hand, our rules should not discourage cable investment in continuing to extend service to unwired homes by failing to account adequately for the property, contractual, and access rights of cable operators. We thus invite comment on how, under this statute, we can best balance these interests in establishing the disposition of cable home wiring upon a subscriber's termination of service.

3. In addition, we request comment on whether the rules would need to be tailored to different settings such as subscribers in single family dwellings, multiple unit dwellings and multiple building settings (e.g. educational campuses, military facilities, and hospitals). The House Report indicated that, "[i]n the case of multiple dwelling units, this section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers.[7] We seek comment on whether and how we should implement such a distinction. We also invite comment on how a terminating subscriber's right to acquire even just the wiring within its individual multiple dwelling unit residence could be reconciled with a cable operator's right ofaccess to the building. Similarly, we ask whether the home wiring rules would need to differentiate between existing and future cable home wiring installations. We also seek comment on the likelihood of subscribers or cable operators wanting the cable home wiring removed upon termination of service.[8]

4. The House Report addressed the theft of service problem facing the cable industry and indicated that rules adopted by the Commission should "not pertain to situations where service has been terminated for nonpayment or for theft of service."[9] We seek comment on how rules should be tailored to address termination based on nonpayment or for theft of service.

5. State property and taxation law may have implications for ownership and valuation of cable home wiring. For example, there are varied state court decisions regarding the ownership of cable home wiring. Some have ruled that the homeowner owns the cable, *see State Dept. of Assessments and Taxation v. Metrovision of Prince George's County, Inc.*, 607 A.2d 110 (Md. Ct. 1992)(drop cables are fixtures and permanent accessions to the subscriber's home); others have ruled that the cable company owns the cable. *Continental Cablevision of Michigan, Inc. v. City of Roseville*, 425 N.W.2d 53 (Mich. 1988)(house drops belong to the cable company for ad valorem tax purposes). We seek comment on how those issues should affect our rules regarding the disposition of cable home wiring upon termination of service. We also invite comment on whether and how we should set limits on the amount that can be

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992)("Cable Act of 1992").

[2] *Id.*, Section 16(d), to be codified at 47 U.S.C. Section 544(i).

[3] H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992)("House Report") at 118; Senate S. Rep. No. 92, 102d Cong., 1st Sess. (1991)("Senate Report") at 23.

[4] By cable home wiring we mean only the cable itself and not any active elements such as amplifiers, decoder boxes or similar apparatuses.

[5] Senate Report at 23; House Report at 118.

[6] House Report at 118 ("This right [to acquire wire] would enable consumers to utilize the wiring with an alternative multichannel video delivery system and avoid any disruption the removal of such wiring may cause."). We seek comment on what considerations should be given to home wiring as it relates to future competition in the cable area.

[7] House Report at 119.

[8] We note that the Communications Act, as amended by the Cable Communications Policy Act of 1984, currently provides, in pertinent part, that the owner of the property be justly compensated by the cable operator for any damage caused by the removal of such facilities by the cable operator. 47 U.S.C. Section 541(a)(2).

[9] House Report at 118.

charged to subscribers for their cable home wiring and the extent to which they have in fact paid for such wiring at the time of installation.

6. In addition, unlike telephone wiring, there is a potential for signal leakage from cable wires for which we hold system operators responsible. Such leakage is a matter of significant concern because small leaks in the aggregate (or even a single strong leak) may interfere with licensed over-the-air services, including aeronautical and safety-of-life services. The House Report indicated that cable operators should "continue to have legal responsibility to prevent signal leakage, since improper installation or maintenance could threaten safety services that operate on critical frequencies."[10] Parties are thus invited to address in their comments any implications these additional issues may have for the policies we are directed to adopt in compliance with new Section 544(i).

III. ADMINISTRATIVE MATTERS

Ex Parte Rules - Non-Restricted Proceeding

7. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

Comment Information

8. Pursuant to procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before December 1, 1992, and reply comments on or before December 15, 1992. Extensions of these time periods are not contemplated. To file formally, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

Regulatory Flexibility Act

9. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Notice*, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. Sections 601 *et seq.* (1980)).

Additional Information

10. For further information concerning this proceeding, contact Mary Beth Richards, Enforcement Division, Field Operations Bureau, (202) 632-7090.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

This proceeding is being initiated in order to seek comment on the best way to implement section 16 of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385, relating to cable home wiring.

Objectives

The Commission's goal is to provide notice and opportunity to comment to members of the public regarding efficacious implementation of section 16 of the new Act.

Legal Basis

Authority of this proposed rule making is contained in section 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), 154(j), and 303(r) and section 16 of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385 (1992).

Reporting, Recordkeeping and other Compliance Requirements

The Commission is asking for comment on the treatment of cable home wiring once a subscriber terminates service.

Federal Rules that Overlap, Duplicate or Conflict with Proposed Rule

None.

Description, Potential Impact, and Number of Small Entities Involved

This rule making could require that subscribers have the option of acquiring ownership of their cable home wiring when they terminate service.

Any Significant Alternatives minimizing the Impact on Small Entities Consistent with the Stated Objectives

None.

[10] House Report at 119.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 85
F.C.C. No. 40	

ORDER

Adopted: November 9, 1992; Released: November 9, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On October 27, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective November 10, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 40 for AT&T Software Defined Network (SDN) Service.

2. On November 3, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 85.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 40, Contract Tariff Transmittal No. 85 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 40, Contract Tariff Transmittal No. 85, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 10, 1992

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Cincinnati Bell Telephone - Request for reconsideration seeking refund of the filing fee submitted in connection with the petition for waiver of Part 69 of the Commission's rules - **Granted** (October 22, 1992).

Cornwell, Frank - Request for exemption of the required filing fee - **Denied** (October 7, 1992).

District Group Communications, Inc. - Request for refund of a hearing fee for a AM broadcast station at Washington, DC - **Granted** (October 6, 1992).

Ellipsat Corporation - Request for determination of the applicable fee for applications filed by Ellipsat - **Denied** (September 30, 1992).

Hansen, Robert P. d/b/a Supreme Radio Company - Petition for reconsideration for a new FM radio station at Kaukauna, Wisconsin - **Denied** (October 27, 1992).

Jupiter Broadcasting Corp. - Request for refund of a hearing fee for a new AM broadcast station at Jupiter, Florida - **Granted** (October 27, 1992).

Koor Communications, Inc. - Request for refund of hearing fee for a new FM station at New London, New Hampshire - **Granted** (September 30, 1992).

William K. Durst and William L Faircloth d/b/a Lexco Radio - Request for refund of a hearing fee for a new FM station at South Congaree, South Carolina - **Granted** (September 30, 1992).

Olszowka, Stephen M. - Request for refund of a hearing fee for a new FM station at Oil City, Pennsylvania - **Granted** (October 27, 1992).

OPTEL Communications, Inc. - Request for refund of the filing fee/request for determination of the appropriate filing fee in connection with an application filed for a non-common carrier submarine cable landing license to cover the installation of a fiber optics cable at Manasquan, New Jersey - **Denied** (October 14, 1992).

Press Broadcasting Company, Inc. - Request for refund of hearing fee for a TV station at Clermont, Florida - **Granted** (October 19, 1992).

Unicom Broadcasting, Inc. - Request for refund of a filing fee submitted for a FM station at Las Vegas, Nevada - **Denied** (October 4, 1992).

Valentine Communications, Inc. - Request for refund of a hearing fee for a new FM station at South Congaree, South Carolina - **Granted** (October 27, 1992).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, TORI SLAPPY, FEE SECTION ON (202)632-0241.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 22 1992

OFFICE OF
MANAGING DIRECTOR

Mrs. Debbie Davidson
Cincinnati Bell Telephone
201 E. Fourth Street
P.O. Box 2301
Cincinnati, Ohio 45201

Dear Ms. Davidson:

This is in response to your request for reconsideration seeking refund of the fee paid by Cincinnati Bell Telephone (CBT) in connection with its petition for waiver of Part 69 of the Commission's rules.

We agree with your interpretation that the fee requirements do not apply to requests for waiver of the tariff rules since the separate fees established for tariff filings would adequately cover the Commission's costs for processing Part 69 waivers. Your request for fee refund therefore will be granted.

Accordingly, a check for $4,660, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 7 1992

OFFICE OF
MANAGING DIRECTOR

Mr. Frank Cornwell
2101 Pacheco
El Paso, Texas 79935

Dear Mr. Cornwell:

This is in response to your request for exemption from the fee required to be filed with an application for a ship radio license.

You state that you believe you are entitled to an exemption because you purchased your radio for use on patrol duty with the United States Coast Guard Auxiliary and use the radio primarily for this purpose.

Section 8(d)(1) of the Communications Act provides that the Commission's fees are not applicable to governmental entities. Thus, applications for radio stations to be installed on vessels under the ownership or control of the United States Coast Guard Auxiliary are not subject to a fee requirement. See 47 U.S.C. § 158(d)(1). However, no such exemption exists for radio stations licensed to members of the Auxiliary, notwithstanding that the radios are used primarily in connection with Auxiliary activities.

Moreover, the Commission may waive the fee requirement only in such specific cases "where such action would promote the public interest." 47 U.S.C. § 158. The legislative history of that section indicates that Congress intended that the Commission's authority to waive fees "shall be narrowly defined." Conference Report to accompany H.R. 3128, H.R. Rep. No. 453, 99th Cong., 1st Sess. 423 (1985). In view of Congress' express limitation on the Commission's authority to grant fee waivers, we cannot find that an individual's use of a radio facility on Auxiliary patrol duty warrants a waiver of the fee requirement.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 6 1992

OFFICE OF
MANAGING DIRECTOR

Gerald Stevens-Kittner, Esquire
Arter & Hadden
1801 K Street, N.W.
Suite 400K
Washington, D.C. 20006-1301

Dear Mr. Stevens-Kittner:

This is in response to your request for hearing fee refund submitted on behalf of District Group Communications, Inc. (District), the licensee of AM broadcast station WUST, Washington, D.C.

You state that District tendered a hearing fee on July 15, 1991 in connection with its application to modify the facilities of station WUST. You further state that at the time there was a possibility that District's application would be mutually exclusive with an application filed by Mar-Bob-Ben to modify the facilities of AM station WEEO, Waynesboro, Pennsylvania. However, subsequently but prior to the issuance of a hearing designation order, Mar-Bob-Ben surrendered its license for WEEO, which mooted its modification application and the need for a hearing. You indicate that Mar-Bob-Ben has received a letter stating that it will be refunded its hearing fee, and you similarly seek such a refund.

Section 1.1111(b) of the Commission's Rules provides for a refund of a hearing fee when an application is granted without being designated for hearing. Our review of this matter indicates that no designation order was issued. Accordingly, your request is granted.

A check, made payable to the maker of the original check in the amount of $6,760.00, will be forwarded to you at the earliest practicable time. If you have any questions concerning this matter, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

SEP 24 1992

OFFICE OF
MANAGING DIRECTOR

Jill Abeshouse Stern, Esquire
Miller & Holbrooke
1225 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Ms. Stern:

This is in response to your request for a determination of the applicable fee for processing applications filed by Ellipsat Corporation (Ellipsat) in connection with its comprehensive satellite system proposal and eighteen individual satellite applications.

You state that the $36,540.00 fee required under the Commission's rules to cover the cost of processing these satellite applications is excessive and that the appropriate fee should be $4,060.00 because the eighteen applications are identical. You contend that the Commission's primary task in processing the applications is to determine whether Ellipsat is qualified to construct the satellites and whether the satellites are properly designed, and that this task is the same whether the Commission reviews one satellite or eighteen satellite applications.

In further support, you state that the Commission has previously adjusted fees in order to ensure that the assessment levied more accurately reflected the processing costs incurred by the Commission. While you recognize that the Commission has not adjusted any fees since Congress revised its fee schedule, you urge that the Ellipsat's fee should be reduced in order to encourage open entry in the satellite service and promote technological innovation. Finally, you argue that imposition of separate, multiple fees is inconsistent with Appendix B of the Space Station Application Filing Procedures, 48 Fed. Reg. 40256 (September 6, 1983), which provides for the filing of a system proposal and an application for each proposed space station as one "application."

As you are aware, Congress has significantly revised the Schedule of Fees. The Schedule now specifically includes provisions for reduced fees for certain categories of multiple applications. See Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106, codified at 47 U.S.C. § 158. Examples of these new provisions may be found in the following sections of the Commission's rules: 1.1105(2)(e), (4)(e), (5)(f), (6)(e), (7)(e), (8)(e), (10)(c), (11)(d), (12)(c), and (13)(c). However, Congress made no provision for a reduction of fees in the case of multiple applications for authority to construct domestic satellites. See 47 C.F.R. § 1.1105(16)(a).

In revising its Fee Schedule, Congress expressly indicated that the new fees "represent a fair approximation of how the Commission's costs should be distributed." See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Act of 1989, 5 FCC Rcd 3558, 3574 (1990), recon. in part, 6 FCC Rcd 5919 (1991). Therefore, we will not engage in a redetermination of Ellipsat's total fee payment since Congress has already enumerated those categories of service where a fee reduction may be appropriate in the case of multiple filings.

Finally, we find no inconsistency between Congress' requirement for a separate fee for each application in a multiple application filing and the Commission's procedures for filing satellite applications.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 27 1992

Eugene T. Smith, Esq.
715 G Street, S.E.
Washington, D.C. 20003

Dear Mr. Smith:

This is in response to your petition for reconsideration submitted on behalf of Robert P. Hansen d/b/a Supreme Radio Company (Hansen), former applicant for a new FM radio broadcast station at Kaukauna, Wisconsin.

You have attached to your petition an affidavit from Hansen in which he states that he filed his application on February 21, 1992. Hansen further states that the application subsequently was returned by the Billings and Collections Branch with the explanation that multiple checks are not acceptable. Hansen then resubmitted his application with a single check on March 6, 1992. This application was later returned by the Chief, FM Branch, Audio Services Division because the application was submitted after the filing window had closed. You now request that Hansen's application be reinstated nunc pro tunc as of the original filing date. In support of your request, you have submitted two letters from the Managing Director's Office reinstating applications that were accompanied by more than one check.

From the implementation of the Fee Collection Program, the Commission has specified that applicants are required to submit one check for each application. Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947 (1987) (Fees I). Exceptions to the "one instrument" rule were considered on reconsideration of Fees I, and the Commission expressly rejected the use of multiple checks for one application on grounds of administrative efficiency. 3 FCC Rcd 5987, 5991-92 (released October 11, 1988) (Reconsideration Order). The letters you submit, dated July 13, 1987 and February 23, 1988, were written prior to the release date of the Reconsideration Order and therefore have no application to the present situation. Moreover, Section 1.1108(b) of the Commission's rules currently provides that "multiple payment instruments for a single application or filing are not permitted." 47 C.F.R. § 1.1108(b). Since Mr. Hansen's explanation fails to demonstrate good cause for waiver of this rule and that waiver in this instance would serve the public interest, his application for Kaukauna, Wisconsin will not be reinstated.

Accordingly, your petition for reconsideration is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 27 1992

Joseph A. Belisle, Esq.
Leibowitz & Spencer
One S.E. Third Avenue
Suite 1450
Miami, Florida 33131

Dear Mr. Belisle:

This is in response to your request for refund of hearing fee submitted on behalf of Jupiter Broadcasting Corp. (JBC), the successful applicant for a new AM broadcast station at Jupiter, Florida.

You state that JBC tendered a hearing fee because its application was mutually exclusive with the license renewal application of Robert Taylor for Station WEXI(AM), Jupiter, Florida. However, Mr. Taylor's renewal application was dismissed at his request by the Chief, AM Branch on January 30, 1992. You state that JBC's application was no longer mutually exclusive with any application pending before the Commission and request that JBC's hearing fee be refunded.

The Commission will refund the hearing fee if a broadcast application is granted without being designated for hearing. 47 C.F.R. § 1.1111(b)(1). In this case, the dismissal of Mr. Taylor's application prior to designation obviated the need for a hearing and JBC's application has since been granted. JBC therefore is entitled to refund of its hearing fee.

Accordingly, a check for $6,760, payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

SEP 30 1992

Mr. Robert Vinikoor
Koor Communications, Inc.
RR#1, P.O. Box 2295
New London, New Hampshire 03257

Dear Mr. Vinikoor:

This is in response to your request for refund of a hearing fee submitted with an application by Koor Communications, Inc. (Koor) for a new FM station at New London, New Hampshire.

Koor and the competing applicant for the station at New London entered into a settlement agreement prior to designation of their applications for a comparative hearing. Subsequently, the Mass Media Bureau approved the settlement agreement, dismissed the competing applicant and granted Koor a construction permit for the station. See Letter to Sheila E. Vinikoor from Dennis Williams, Chief, FM Branch, dated August 12, 1992.

Under the circumstances described above, we find that Koor is entitled to a refund. Section 1.1112(b)(1) provides for a refund of a hearing fee whenever a broadcast application is granted without designation for hearing. 47 C.F.R. § 1.1112(b)(1).

Accordingly, your request is granted. A check, drawn in the amount of $6,760.00 and made payable to the maker of the original check, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

SEP 30 1992

OFFICE OF
MANAGING DIRECTOR

Roy F. Perkins, Jr., Esq.
1724 Whitewood Lane
Herndon, Virginia 22070

Dear Mr. Perkins:

This will respond to your request for refund of a hearing fee filed on behalf of William K. Durst and William L. Faircloth, d/b/a Lexco Radio, in connection with their construction permit application for a new FM station at South Congaree, South Carolina.

You state, and your documentation demonstrates that, prior to designation for hearing, Lexco Radio entered into a settlement agreement with one of its competing applicants. The Hearing Designation Order approved the settlement agreement, and dismissed Lexco Radio's application.

Under the circumstances, since Lexco Radio voluntarily dismissed its application and was not designated for hearing, refund of the hearing fee is appropriate. See 47 C.F.R. §1.1111(c)(2); see also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 27 1992

Neal J. Friedman, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Friedman:

This will respond to your request for refund of hearing fee filed on behalf of Stephen M. Olszowka in connection with his construction permit application for a new FM station at Oil City, Pennsylvania.

You state that prior to designation for hearing the Commission dismissed the application of the competing applicant and granted the application of Mr. Olszowka.

Under the circumstances, since Mr. Olszowka's application was granted without being designated for hearing, refund of the hearing fee is appropriate. See 47 C.F.R. § 1.1111(c)(1).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 14 1992

Andrew D. Lipman, Esquire
Swidler & Berlin, Chartered
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007-3851

This is in response to your request, filed on behalf of OPTEL Communications, Inc. (OPTEL), for refund of the fee payments that OPTEL submitted in connection with its application for a non-common carrier submarine cable landing license to cover the installation of a fiber optics cable at Manasquan, New Jersey. Alternatively, you request a determination of the appropriate fee for the processing of OPTEL's application.

The staff required OPTEL to submit a fee payment to cover its non-common carrier cable landing application. In response, OPTEL first submitted a check for $1,025.00, the amount required for an application for a common carrier submarine cable landing license. When notified by the staff that its fee payment was insufficient, since OPTEL had applied for a non-common carrier cable landing license, OPTEL submitted a second check, in the amount of $10,150.00, the correct fee for its application.

You maintain that no fee may be assessed because the revised Schedule of Charges does not contain a fee for non-common carrier cable landing license applications. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1990), recon. in part, 6 FCC Rcd 5919 (1991). You acknowledge, however, that Section 8 of the Communications Act, as amended, 47 U.S.C. § 158, established a revised Schedule of Charges, including a new non-common carrier cable landing license application fee. However, you contend that the Commission cannot enforce this particular fee because Congress required that the Commission prescribe its fees by publication in the Federal Register before they could become effective, and the Commission did not include the applicable fee in the schedule that it published. See Public Law No. 101-239, 103 Stat. 2106; see also Conference Report to accompany H.R. Rep. No. 386, 101st Cong., 1st Sess. 20-28, 433. In addition, you note that the Commission stated that "those requests for regulatory action or required filings that are not listed in the Schedule of Charges are not subject to a fee." See 5 FCC Rcd at 3574. Therefore, you believe that OPTEL's fee must be returned because the Commission failed to prescribe the appropriate fee, as required by Congress, and because the Commission stated that it would collect only those fees prescribed in the revised Schedule of Charges.

We recognize that the Fee Schedule, as adopted by the Commission, does not explicitly contain a fee requirement for non-common carrier cable landing license applications due to a typographical error. However, we conclude that OPTEL was provided with adequate notice of its requirement to pay this fee. The Administrative Procedure Act (APA) states that "except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." See 5 U.S.C. § 552(a)(1). As you were aware, the staff orally advised OPTEL of its obligation to pay the fee when filing its application. That action timely informed OPTEL of the fee requirement and provided OPTEL with the alternative notice permitted by the APA. In this connection, OPTEL suffered no harm in making its fee payment other than to subject itself to the fee requirement that Congress had imposed.

Moreover, the Commission's public notice of Congress' enactment of a fee for non-common carrier cable landing license applications was adequate. The fee was inadvertently omitted from the Commission's publication of the new fee schedule. However, as you recognized, the requirement was published in the guidelines that the Commission published with the new schedule, and, under the APA, interpretations, i.e., guidelines, published in the Federal Register are considered a part of the rule they are designed to interpret, and, thus, are binding for purposes of notifying the public of the meaning of a rule. See 5 U.S.C. § 552(D).

Further, the omission of the fee requirement was inadvertent since the fee schedule that the Commission contemplated in its rulemaking was the fee schedule enacted by Congress. In fact, the Commission informed the public that the Fee Schedule it was adopting was the same as that enacted by Congress and advised the public to carefully review the fees that were described in detail in the Congressional Record of November 21, 1989, H961016. See 5 FCC Rcd at 3574. The text's inexplicable reference to "Replacement Satellites" in the rule's subsection relating to cable landing licenses should have been sufficient warning to cause OPTEL to seek further guidance in the appended "guidelines" or to refer to the Congressional Record. It is obvious that the Commission in announcing that it would require payment only of those fees specified in the fee schedule intended to affirm that it would impose only those fees enacted by Congress. Id.

Finally, you state that the $10,150.00 fee for non-common carrier cable landing licenses is excessive because it imposes a financial burden on an applicant far disproportionate to any regulatory expense that the Commission incurs in processing such applications. You argue that the non-common carrier fee was calculated by adding the common carrier fee of $1,025.00 to the $9,125.00 fee for a section 214 application, and that this portion of the fee is irrelevant to a non-common carrier application.

The Commission adopted its Schedule of Charges, including the fee for non-common carrier cable landing license applications, as enacted by Congress. Congress stated that the fees imposed by the Schedule "represent a fair approximation of how the Commission's costs should be distributed." Id. Therefore, we will not engage in a fee determination since Congress has recently established the appropriate fee for this particular category of service. We note that Congress afforded the public ample opportunity for comment on its proposed fee schedule prior to its enactment. While the Commission has reduced fees in the past, this action was related to fee payments for multiple applications prior to Congress' recent revision of the fee schedule.

Accordingly, your request for refund of the $10,150.00 fee submitted by OPTEL for a non-common carrier cable landing license is denied. However, OPTEL's initial fee payment of $1,025.00 will be refunded.

A check, made payable to the maker of the original check and drawn in the amount of $1,025.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 19 1992

Ms. Beverly A. Myers
Cable Relations Manager
Press Broadcasting Company, Inc.
WKCF-TV18
602 Courtland Street
Suite 200
Orlando, Florida 32804

Dear Ms. Myers:

This is in response to your request for refund of the fee submitted by Press Broadcasting Company, Inc., (Press) permittee of station WKCF(TV), Clermont, Florida, to cover a petition for a declaratory ruling that its station is significantly viewed in Brevard County, Florida. Press submitted an overage of $685.00 with the $105.00 payment required to be submitted with its waiver petition for a total fee payment of $790.00.

In its Memorandum Opinion and Order entered on reconsideration of the Fee Collection Program, the Commission determined that fees for "significantly viewed" petitions were not generally contemplated under the fee legislation or the Fee Collection Program. See 47 U.S.C. § 158; see also Fee Collection Program, 2 FCC Rcd 947 (1987), as modified, 3 FCC Rcd 5987, 5989 (1988).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $790.00, the amount of your original check, will be sent to you at the earliest practicable time.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 4 1992

Francisco R. Montero, Esquire
Fisher, Wayland, Cooper
and Leader
1255 Twenty-third Street, N.W.
Suite 800
Washington, D.C. 20037-1170

Dear Mr. Montero:

This is in response to your request for refund of the filing fee submitted by Unicom Broadcasting, Inc. (of Nevada) (hereinafter, Unicom), licensee of station KEYV(FM), Las Vegas, Nevada.

Unicom filed an application to change its station's call letters, but the following day withdrew its application and requested refund of its filing fee.

I regret to inform you that your request cannot be granted. Section 1.1111 of the Commission's rules governing fee refunds makes no allowance for refund of a fee payment upon the withdrawal of an application. 47 C.F.R. § 1.1111. Moreover, the Commission has explicitly determined that a fee refund will not be granted once an application has cleared the fee review process. See Establishment of a Fee Collection Program, 2 FCC Rcd 947, 949 (1987), Recon. denied, 3 FCC Rcd 5987 (1988).

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

OCT 27 1992

George L. Lyon, Jr.
Marjorie K. Conner
Lukas, McGowan, Nace
& Gutierrez
1819 H Street, N.W.
Seventh Floor
Washington, D.C. 20006

Dear Mr. Lyon and Ms. Conner:

This will respond to your request for refund of a hearing fee filed on behalf of Valentine Communications, Inc. ("Valentine") in connection with its construction permit application for a new FM station at South Congaree, South Carolina.

You have requested a refund because prior to the Notice of Appearance deadline, Valentine voluntarily dismissed its application, and the single remaining applicant was immediately grantable.

Section 1.1111 (c) (4) of the Commission's rules provides for a refund of a hearing fee whenever an application is withdrawn pursuant to a settlement agreement prior to the Notice of Appearance deadline. Since the settlement agreement was timely filed and the remaining application was granted, refund of the hearing fee is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FCC 92-440

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Expanded Interconnection with Local Telephone Company Facilities	)	CC Docket No. 91-141
	)	
Amendment of the Part 69 Allocation of General Support Facility Costs	)	CC Docket No. 92-222

REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: September 17, 1992 Released: October 19, 1992

Comment Date: December 4, 1992
Reply Date: December 21, 1992

By the Commission: Chairman Sikes, concurring in the result, dissenting in part and issuing a separate statement; Commissioners Quello, Marshall, and Barrett issuing separate statements.

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I. INTRODUCTION

A. Summary

1. In this Order, we take a historic step in the process of opening the remaining preserves of monopoly telecommunications service to competition. The measures that we adopt today will promote increased competition in the interstate access market by requiring that the Tier 1 local exchange carriers (LECs)[1] offer expanded interconnection to all interested parties, permitting competitors and high volume users to terminate their own special access transmission facilities at LEC central offices. These LECs are required to offer physical collocation to all interconnectors that request it, though the parties remain free to negotiate satisfactory virtual collocation arrangements.[2]

2. Our decision in this proceeding represents one of many steps that the Commission is taking to ensure that telecommunications customers obtain the full benefits of technological advances that have spurred the development of new fiber optic and radio networks that compete with existing LEC services.[3] This growing competition will expand service choices for telecommunications users, heighten incentives for efficiency, speed technological innovation, and increase pressure for cost-based prices.

3. We here make numerous decisions necessary to turn our expanded interconnection policy into reality on an expeditious basis. Tier 1 LECs are required to file expanded interconnection tariffs for special access within 120 days of the release of this Order. These tariffs will include connection charges designed to compensate the LECs for services offered to inter-

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[1] Tier 1 LECs are companies having annual revenues from regulated telecommunications operations of $100 million or more. Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs, 5 FCC Rcd 1364, 1364 (Common Carrier Bur. 1990) (defining Tier 1 LECs using the criteria used to define Class A companies in 47 C.F.R. §§ 32.11(a) & 32.11(e)).

[2] For a description of physical and virtual collocation, see infra ¶¶ 39-46.

[3] See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995 (1990), Policy Statement and Order, 6 FCC Rcd 6601 (1991), Notice of Proposed Rulemaking, 7 FCC Rcd 5676 (1992); Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1 (1988), recon., 5 FCC Rcd 3084 (1990), compliance filings approved in part, 5 FCC Rcd 3103 (1990), erratum, 5 FCC Rcd 4045 (1990), pet. for recon. pending, pets. for rev. pending, California v. FCC, No. 90-70336 (9th Cir., filed July 5, 1990), further requirements established, 6 FCC Rcd 7646 (1991), pet. for rev. pending, MCI Telecommunications Corp. v. FCC, No. 92-70189 (9th Cir., filed Feb. 19, 1992); Intelligent Networks, Notice of Inquiry, 6 FCC Rcd 7256 (1991).

connectors. The LECs will not be allowed to impose a contribution charge at this time. Instead, we are proposing to eliminate the only regulatory support flow that has been identified in this proceeding as potentially warranting a contribution charge -- the over-allocation of general support facility (GSF) costs to special access.[4] We also grant the Tier 1 LECs additional special access pricing flexibility in light of the increased competition that will result from this decision. We believe that these measures will establish an equitable regulatory framework for increased competition in the interstate special access market.

B. Background

4. Although the LECs currently provide most interstate access service, a growing number of Competitive Access Providers (CAPs) have entered the access market in recent years, deploying fiber-optic rings or, in some cases, microwave systems, to serve the needs of large communications-intensive businesses, predominantly in metropolitan centers.[5] CAPs have formed strategic partnerships with and attracted major investments from cable television companies, electric utilities, large construction firms, and other entities with extensive financial resources. At present, CAPs generally are limited to providing end-to-end interstate special access connections, for example, between customer premises and interexchange carrier (IXC) points of presence (POPs), completely bypassing LEC facilities. The LECs' current special access tariffs make it economically infeasible for customers to combine their own or CAP facilities with portions of the LEC network to satisfy their special access needs.

5. Under the current tariffs, interstate special access customers generally must pay two channel termination charges: (1) a charge covering transmission from the customer's premise to the LEC central office; and (2) a

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[4] The LECs may file requests seeking Commission approval of a contribution charge in the future to recover specifically identified regulatory support flows or non-cost-based allocations recovered through rates for special access services subject to competition.

[5] These competitors now carry significant amounts of high capacity special access traffic in certain urban centers. Twenty-three CAPs reported investing $82.6 million and deploying 2,071 route miles of fiber to 5,891 customer locations by the end of 1991. These CAPs reported operating in cities of various sizes throughout the country, including Atlanta, Boston, Chicago, Dallas, Detroit, Houston, Indianapolis, Los Angeles, Minneapolis, New York, Newark, Philadelphia, Pittsburgh, San Francisco, Seattle, and Washington, D.C., as well as Princeton, Cambridge, Orlando, Tampa, Portland, Rochester, Kansas City, Birmingham, Tulsa, Des Moines, Grand Rapids, and certain suburban areas. See Kraushaar, Fiber Deployment Update, End of Year 1991 at 30-35 (FCC Common Carrier Bureau, Industry Analysis Div., Mar. 20, 1992).

charge covering transmission from the LEC central office to an IXC POP.[6] In addition, special access customers must pay for any necessary interoffice transmission when the IXC POP and the customer premises are not served by the same LEC central office. Under this structure, a full channel termination charge applies regardless of the length of the connection between the CAP or other customer and the LEC central office. Consequently, a customer using CAP facilities to a point just outside of the LEC central office must pay a full channel termination charge for interconnection to the central office in addition to applicable CAP charges. This tariff structure makes it economically infeasible for customers to use LEC facilities between their premises and a LEC central office, and CAP facilities between that LEC office and the IXC POP, for example. Customers either must use LEC facilities for the entire special access connection, or bypass the LEC completely and use alternate facilities to obtain end-to-end connections between their premises and the IXC POP.

6. We initiated this proceeding last year to consider CAP requests for new interstate interconnection arrangements allowing them to interconnect at, or near, the LEC central office under rates, terms, and conditions that the CAPs argue would more accurately reflect the facilities they use.[7] In doing so, we issued a Notice of Proposed Rulemaking (Notice) proposing specific policies to govern expanded interconnection for special access service, and adopted a Notice of Inquiry concerning expanded interconnection for switched transport service.[8] Sixty-six parties filed comments and 62 filed replies.[9]

7. In considering interstate expanded interconnection issues, we benefit greatly from the states' experiences. The New York Public Service Commission, for example, has ordered LECs in its jurisdiction to allow CAPs and others to interconnect with both unswitched and switched intrastate services at LEC central offices, using either physical collocation or a form

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[6] For the sake of simplicity, we will assume that the special access line connects the user's premises with an IXC POP.

[7] On November 14, 1989, Metropolitan Fiber Systems (MFS) filed a Petition for Rulemaking in which it asked the Commission, among other things, to develop rules providing CAPs with interconnection to LEC networks on reasonable and nondiscriminatory terms through the unbundling of special access tariffs. Teleport Communications Group (Teleport) filed a Petition for Declaratory Ruling on March 27, 1987 that raised similar issues.

[8] Expanded Interconnection with Local Telephone Company Facilities, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 3259 (1991) (Notice), erratum, 6 FCC Rcd 4818 (1991), Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5809 (1991).

[9] Parties filing formal comments or replies are listed in Appendix A.

of virtual collocation as an alternative.[10] The Illinois, Massachusetts, and California commissions also have approved LEC intrastate expanded interconnection offerings developed in order to settle interconnector complaints.[11] Colorado, North Dakota, Maryland, Pennsylvania and other states have considered related issues.[12]

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10 See Regulatory Response to Competition, Opinion No. 89-12, Case 29469 at 21-32 (N.Y. PSC May 16, 1989) (ordering private line interconnection); Order Regarding OTIS II Compliance Filing, Cases 29469 and 88-C-004 (N.Y. PSC May 8, 1991) (approving physical collocation tariff for private line interconnection); Comparably Efficient Interconnection Arrangements, Opinion No. 91-24, Cases 88-C-004, 88-C-063 and 91-C-1174 (N.Y. PSC Nov. 25, 1991) (ordering LECs to unbundle the link (transmission) and port (connection) portions of local loops); Pooling, Collocation and Access Rate Design, Opinion No. 92-13, Case 28425 at 23-70 (N.Y. PSC May 29, 1992) (ordering interconnection to switched services).

11 See Access Charges, the Administration of the High Cost Fund, Administration of the Illinois Small Carrier Association and Other Telecommunications Issues, Third Interim Order, Docket No. 90-0425 (Ill. Commerce Comm'n Feb. 5, 1992) (approving interconnection agreement between Illinois Bell Telephone and Teleport); Complaint of Teleport Communications-Boston Seeking the Provision of Certain Interconnection Arrangements from the New England Tel. and Tel. Co., D.P.U. 90-206, D.P.U. 91-66 (Mass. Dept. Pub. Util. July 31, 1991 & Aug. 14, 1991) (approving interconnection agreement between New England Telephone and Teleport and the implementing tariff); Establishment of a Forum to Consider Rates, Rules, Practices and Policies of Pacific and GTE, I.90-02-047, No. 0001 (Calif. PUC Sept. 25, 1991) (approving interconnection agreement between Pacific Bell and Teleport Communications Group).

12 See Collocation and Interconnection Between Local Exchange Carriers and Competitive Access Providers, Advance Notice of Proposed Rulemaking, Docket No. 92R-050T at 1-2 and 4 (Colo. PUC Jan. 31, 1992) (proposing to allow telecommunications providers to collocate and interconnect with local exchange carriers' facilities); Public Service Commission Implementation of SB 2320-Subsidy Investigation, Case No. PU-2320-90-183, at 32 (N.D. PSC April 7, 1992) (requiring LECs to provide connections to the local exchange network that are equal to the connections available to the LEC for competing services); Metropolitan Fiber Systems of Baltimore, Inc. v. C&P Tel. Co. of Maryland, (Md. PSC, filed July 24, 1991). On October 1, 1992, in settlement of a complaint brought by MFS, Bell of Pennsylvania filed a tariff with the Pennsylvania Public Utility Commission offering intrastate expanded interconnection through both physical and virtual collocation. See also Metropolitan Fiber Systems v. Southwestern Bell Tel. Co., Docket No. 9640, Examiner's Order No. 22, (Tex. PUC, June 12, 1992) (holding activity in docket in abeyance until October 12, 1992 because of parties' involvement in related FCC interconnection proceedings); Application of Electric Lightwave, Inc., Docket No. UT-901029 (Wash. Util. & Trans. Comm. Dec. 6, 1991) (authorizing applicant to provide interexchange, but not intraexchange, special access service), clarified, recon. denied (Mar. 13, 1992).

II. PUBLIC POLICY ANALYSIS

8. Notice. The Commission tentatively concluded that expanded interconnection, with the likely resulting increase in competition, would produce substantial benefits for consumers that would outweigh potential costs. We observed that competition has produced important benefits in the interstate toll and customer premises equipment (CPE) markets, such as reduced rates, a larger variety of service options, and more rapid deployment of new technologies. We therefore tentatively concluded that the increased competition created by expanded interconnection also would: increase customer choice, particularly for customers in need of enhanced service reliability; increase LEC incentives for efficiency; spur the LECs to deploy new technologies and improve customer service; and yield cost-based prices for services subject to competition. While recognizing that competition will tend to bring pressure to reduce or even eliminate any non-economic support flows in the current special access tariffs, we also tentatively concluded that any necessary adjustments to LEC special access pricing could be readily achieved without undue hardship.[13]

9. Comments. The CAPs, users, and certain IXCs believe that the public benefits of expanded interstate special access interconnection are significant. They state that it will: improve network reliability through redundancy and route diversity; increase customer choice; improve LEC efficiency, service quality, and responsiveness; speed deployment of new technology; and bring more cost-based prices.[14] They also argue that increased competition will encourage development of innovative services.[15] MFS suggests that expanded interconnection will provide competitive alternatives to businesses that are located outside dense urban areas by making access to LEC low-density lines by interconnectors economically viable.[16] Many users also state that current CAP offerings provide improved service and superior technology.[17]

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13 Notice, 6 FCC Rcd at 3260-61, ¶¶ 11-16.

14 See, e.g., AT&T Comments at 3; CompTel Comments at 3-5; Mid-American Comments at 3-6; Teleport Comments at 4-6; FMR Comments at 3-5; MFS Comments at 9-14; Locate Comments at 3-7; Teleport Denver Comments at 5-6; ALTS Comments at 5-8; IDA Comments at 3-5; Ad Hoc Comments at 4-6; ANPA Comments at 2; API Comments at 3-9; AAR Comments at 2-5; Bankers Comments at 3-8; CompuServe Comments at 3-4; EDS Comments at 3-4; GSA Comments at 5-7; ICA Comments at 3-5; IIA Comments at 2; UTC Comments at 2-3; Wells Rural Electric Comments at 4-7. See also MetroComm Comments at 1.

15 See, e.g., PCNS-NY Comments at 2-6; MFS Comments at 13-14; IDCMA Comments at 14-15. See also Justice Reply Comments at 24.

16 MFS Comments at 14, n.17.

17 See, e.g., API Comments at 4-9; Bankers Comments at 3-7; Wells Rural Comments at 4-5.

10. NTIA and the SBA agree that expanded interconnection will confer substantial benefits.[18] Justice also supports expanded interconnection for special access, arguing that it will remedy the inefficiencies of LEC special access pricing.[19] Justice believes that expanded interconnection is justified because of the LECs' market power over local loops, central office connections and switching, and their incentive to exclude competitors. Justice contends that competition will be more effective than reformed regulation in increasing efficiency.[20]

11. While generally agreeing that increased competition is a worthy goal, many LECs fear that the costs associated with our expanded interconnection proposal, as formulated in the Notice, exceed the advantages.[21] At the outset, they criticize our statement that competition in the interexchange market has been the impetus for sharply lower rates.[22] The LECs contend that the significant post-divestiture drop in long-distance rates is the result of the FCC's policy of rebalancing local and toll rates through subscriber line charges and separations changes.[23] They also express concern that expanded interconnection will cause harm not only to themselves, but also to local ratepayers.[24] In particular, Ameritech contends that the Commission proposal will be harmful unless implemented in conjunction with LEC pricing flexibility.[25] NYNEX argues that as a result of expanded interconnection, LECs will have to respond to competition in metropolitan areas,

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18 NTIA Reply Comments at 6-7; SBA Comments at 16-17.

19 Justice Reply Comments at 7-27.

20 Id.

21 See, e.g., Ameritech Comments at 2-24; SW Bell Comments at 1-43; BellSouth Comments at 1-5.

22 Notice, 6 FCC Rcd at 3260, ¶ 11; Ameritech Comments at 19-20; NYNEX Comments at 5-8; Alabama Reply Comments at 4.

23 See, e.g., NYNEX Comments at 5-8 and Taylor Study at 1-3; Bell Atlantic Comments at 10-11. MCI contends that the LECs are wrong in asserting that the consumer benefits seen in the interexchange market are not a result of competition. MCI Reply Comments at 13-16. MCI contends that the LEC study in this area fails to take into account all causes of pre- and post-divestiture price changes. MCI also asserts that the FCC would never have revised its access charge structure in the absence of competitive market forces. In addition, MCI argues that the LECs ignore the tangible non-price benefits, such as numerous new services, that are a result of interexchange competition. MCI Comments, Baseman Affidavit at 23-24.

24 See, e.g., Bell Atlantic Comments at 3-12; GTE Comments at 22-25; BellSouth Comments at 30-43.

25 Ameritech Comments at 37-41.

slowing the introduction of new technologies in rural areas.[26] SW Bell submits that LECS will lose hundreds of millions of dollars in revenue as a result of expanded interconnection, which will cause costs to shift to the state jurisdiction, force local exchange rates to increase,[27] and create a disincentive to invest in new technologies.[28]

12. A number of the small LECs argue that expanded interconnection could have adverse effects, hindering infrastructure development and potentially undermining universal service in rural areas.[29] They also express concern about potential adverse effects on current rate averaging.[30] Many of the state commissions also express concern that expanded interconnection will cause LEC revenue losses, stranded investment, jurisdictional cost shifts, and local rate increases that could detract from universal service.[31]

13. Discussion. Competition in the interexchange and CPE markets has brought consumers increased service options, reduced rates, and faster implementation of new technologies.[32] For example, prompted by the pressures

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26 NYNEX Comments at 8-9. See also Bell Atlantic Comments at 10-11; NTCA Comments at 3-4; NTCA Reply Comments at 6-9; OPASTCO Comments at 2-5; TDS Comments at 8-10.

27 SW Bell Reply Comments at 10-11 and Appendix A. In particular, SW Bell presents a study estimating that it could lose $332 to $696 million in interstate and intrastate revenues as a result of expanded interconnection, with a shift of $73.9 million to the state jurisdiction, and an increase of $0.34 to $0.64 in monthly basic local rates for residential customers. Id. at 18 and Appendix A, 25.

28 SW Bell Comments at 39-41.

29 See, e.g., TDS Comments at 21-22; OPASTCO Comments at 2-5. See also NCTA Reply Comments at 19-21.

30 See, e.g., TDS Comments at 7-8; TDS Reply Comments at 3-17; Kansas Independent Rural Telephone Companies Reply Comments at 7; OPASTCO Reply Comments at 3-7.

31 See, e.g., Florida Comments at 3-4; Alabama Reply Comments at 3-7.

32 See generally R. Crandall, After the Breakup: U.S. Telecommunications in a More Competitive Era (1991) (empirical analysis of benefits of interexchange and CPE competition); R. Noll & S. Smart, "Pricing of Telephone Services," in B. Cole, ed., After the Breakup: Assessing the New Post-Divestiture Era 185, 187 (1991) (federal policies caused CPE and interexchange prices to decline); A.D. Kelley, "Advances in Network Technology," in B. Cole, supra, at 347, 348 (CPE and interexchange competition caused increased diffusion of technological change and clear social benefits); Trends in Telephone Service at 8 (FCC Common Carrier Bureau, Industry Analysis Div., Sept. 1992) (during each year from 1984 to

of competition, the AT&T has introduced reduced rate calling plans for residential customers and businesses of all sizes.[33] AT&T's competitors also offer innovative calling plans.[34] In addition, interexchange competition has fostered the deployment of new technology. Sprint, for example, was the first IXC to construct a fully fiber optic network. The rate of innovation in both residential and business CPE also has increased dramatically since the introduction of competition, with an increased range of customer choices in telephone handsets, answering machines, key telephone systems, private branch exchange (PBX) equipment, facsimile machines, voice mail equipment, modems and other data communications equipment.[35] Inflation-adjusted charges for CPE have also fallen.[36]

1990, prices of interstate toll calls declined substantially relative to inflation).

[33] These include REACH-OUT America and AT&T PRO WATS, as well as Tariff 12 offerings. AT&T Communications, Tariff FCC No. 1, § 8; AT&T Communications, Tariff FCC No. 12.

The LECs are correct that a major portion of the dramatic post-divestiture rate reductions for Message Telephone Service (MTS), Wide Area Telephone Service (WATS) and 800 Service resulted from such regulatory changes as the implementation of Subscriber Line Charges (SLCs). Competitive services priced below AT&T's offerings, however, also have been a significant factor in pushing AT&T's rates lower. For example, the consumer benefits of the AT&T reduced rate calling plans and Tariff 12 offerings are independent of these regulatory changes, as are the innovative calling plans introduced by its competitors.

[34] The MCI Friends and Family calling plan, for instance, uses sophisticated billing software.

[35] See P. Huber, The Geodesic Network: 1987 Report on Competition in the Telephone Industry, 1.10-1.17 & chapters 10, 15-17 (U.S. Dept. of Justice, 1987).

[36] According to producer price indexes published by the U.S. Bureau of Labor Statistics, from December 1985 to August 1992, the prices of telephone handsets and station equipment decreased by 14%, the prices of digital PBXs with 400 or fewer lines decreased by 4%, and the prices of digital PBXs with more than 400 lines decreased by 11%. By contrast, the Consumer Price Index for all items rose by 29% during the same period.

14. We believe that increased competition will produce similar results in the interstate special access market.[37] The growth in competition resulting from expanded interconnection should increase LEC incentives for efficiency and encourage LECs to deploy new technologies facilitating innovative service offerings. It also should make the LECs more responsive to customers in providing existing services. Moreover, we believe that in many areas of the country, expanded interconnection will increase the choices available to access customers who value redundancy and route diversity. Network outages have increased awareness that even partial alternatives to the LEC networks may be valuable.[38] In addition, increased competition will tend to reduce prices for services available from both the LECs and alternative suppliers.[39]

15. Increased competition in the interstate special access market undoubtedly will result in some diversion of business from the LECs. We are convinced, however, that the dire predictions of revenue losses made by SW Bell, for example, are based on highly unrealistic assumptions.[40] The

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[37] Commenters have not demonstrated that the interstate special access market differs from the interexchange and CPE markets in ways that would prevent achievement of the benefits that we have seen in those markets. In fact, special access competition and the resulting benefits could develop more rapidly than interexchange competition.

[38] The actual increase in network reliability for customers brought about by expanded interconnection, of course, will be limited by the fact that certain LEC outages, such as a break in the cable facilities between the central office and user premises, also would interrupt service on CAP circuits interconnected with the disrupted LEC circuits.

[39] U S West alleges that the Notice and responsive comments will not provide a sufficient basis for Commission action. It argues that the Commission should withdraw the current Notice of Proposed Rulemaking and Notice of Inquiry, and institute an Inquiry concerning competition in the local exchange. U S West Reply Comments at 67-74. California also asserts that the Commission should perform further economic analysis of the viability of local competition. California Comments at 2-4. We disagree. The record in this proceeding and our own experience with the effects of competition in the interexchange and CPE markets provide an ample basis for our conclusion that expanded interconnection for the provision of special access will produce substantial benefits that outweigh any potential detriments.

[40] For example, SW Bell assumes that in the near term, the three largest IXCs would shift virtually all of their traffic above the end-office to CAPs in the wire centers where CAPs are located. See SW Bell Reply Comments, App. A at 4-22. This is based on the assumption that the LECs could not retain traffic by lowering their rates. SW Bell also assumes, incorrectly, that we would not allow any changes in its special access rates. Id. at 26. See infra ¶¶ 172-86. Even if the IXCs do not divide their traffic between CAPs and the LECs to achieve redundancy, we believe that the IXCs are unlikely to shift virtually all their traffic to the CAPs, at least

Tier 1 LECs already have significant pricing flexibility under price cap and rate-of-return regulation and we are authorizing some limited additional flexibility with the implementation of expanded interconnection. In light of this, we are convinced that the Tier 1 LECs will be able to compete effectively on the basis of price.

16. In the case of Tier 1 LECs, we do not believe that the implementation of expanded interconnection for special access will undermine service to rural areas. The record in this proceeding does not indicate that interstate special access service provides support for residential exchange service in rural areas. The LECs are unlikely to ignore the needs of rural customers large enough to use special access service. In fact, by permitting the LECs to make special access rates in rural areas more consistent with costs, this Order should encourage Tier 1 LECs to deliver state-of-the-art services to rural special access customers. We also have chosen to proceed cautiously by excluding the smaller LECs, which generally serve rural areas, from the expanded interconnection requirements.

17. Expanded interconnection for interstate special access indirectly may shift some costs to the state jurisdictions through the separations process. There is no basis, however, for concluding that such a shift would threaten universal service. Even the worst-case separations effects hypothesized by SW Bell are well under $1.00 per line per month -- not of a magnitude to threaten subscribership.[41] Nor do we find any basis for concluding that expanded interconnection for the provision of special access will result in deaveraged residential interstate MTS rates.[42]

18. Based on this analysis, we conclude that expanded interconnection for the provision of interstate special access service will produce benefits that substantially outweigh any potential drawbacks. Prompt Commission action is necessary to avoid delaying important benefits for telecommunications users, and the United States economy as a whole.

III. SCOPE AND TIMING OF COMMISSION ACTION

19. Notice. The Notice proposed expanded interconnection for the provision of special access. At the same time, we began an inquiry to gather

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until the CAPs have established a track record of reliability in handling larger traffic volumes. Finally, SW Bell's projections attribute all special access traffic losses to expanded interconnection, and fail to take into account the traffic that it would lose to the CAPs as a result of end-to-end bypass even without expanded interconnection.

[41] By comparison, telephone subscribership increased during implementation of the residential $3.50 subscriber line charge. See Trends in Telephone Service at 1-3.

[42] Special access is used in conjunction with private line service, WATS, 800 Service, and various high-volume business services, such as AT&T's Megacom and SDN services. It is not used in the provision of MTS.

additional information before determining whether to propose expanded interconnection for the provision of switched transport. We did not specifically discuss the relationship of these proceedings to other matters, such as modification of the switched transport rate structure or comprehensive separations and access reform.

20. Comments. In their initial comments, many of the LECs argue that the Commission should consolidate the expanded interconnection proceeding into a comprehensive access proceeding.[43] Many of the LECs also contend that the Commission must change the transport rate structure prior to implementing expanded interconnection at all, or that the Commission should consider expanded interconnection for special access and switched transport simultaneously, given the high degree of cross-elasticity between the two services.[44] In addition, several LECs, NARUC, and several state commissions argue that a Joint Board should be convened to consider issues such as changes to the separations rules before the Commission implements expanded interconnection.[45] Some states argue that a Joint Board also should conduct a review of Part 69 and address the right to and price of collocation, as well as which services, exchanges, and companies would be covered by a new special access rule.[46] Certain states and NARUC also argue that expanded interconnection should be considered in conjunction with other related issues, such as preemption of intrastate interconnection policy, impact on access rate structure, potential deaveraging of toll, access and local rates, and pricing of transport.[47]

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43 See, e.g., Ameritech Reply Comments at 4-8; Pacific Comments at 6-10; GTE Comments at 11-19; BellSouth Comments at 18-19, 43; BellSouth Reply Comments at 2-6, 34; United Comments at 1-2, 22-23; Cincinnati Bell Comments at 9-10; USTA Comments at 2-8; SW Bell Reply Comments at 1-7; GTE Reply Comments at 28-32; Centel Reply Comments at 3-5.

44 See, e.g., BellSouth Comments at 4, 7-18; Ameritech Comments at 34-36 & App. (Levin Affidavit) at 12-18; GTE Comments at 11-18, 51-52; SW Bell Comments at 13-20; United Comments at 1-2, 22; Lincoln Comments at 3; Texas Telephone Ass'n Reply Comments at 4; BellSouth Comments at 4, 7-12; Ameritech Comments at 34-36; GTE Comments at 11-17, 51-52; SW Bell Comments at 13-20; United Comments at 1-2, 22; Lincoln Comments at 3; SW Bell Reply Comments at 19-21; NTCA Reply Comments at 16-18. See also TDS Reply Comments at 24-27; Tallon Cheeseman Reply Comments at 4-8.

45 See, e.g., SW Bell Comments at 35-38; SW Bell Reply Comments at 50; Lincoln Comments at 3; TDS Comments at 21-22; NTCA Reply Comments at 21-22; NARUC Comments at 12-14; Virginia Comments at 6. See also Arkansas/Missouri Reply Comments at 7-8; Minnesota Dept. Reply Comments at 4-6; Minnesota Commission Reply Comments at 4-6.

46 Arkansas/Missouri Reply Comments at 8; Minnesota Dept. Reply Comments at 6; Minnesota Commission Reply Comments at 6.

47 See, e.g., NARUC Comments at 4-12; California Reply Comments at 1-2.

21. USTA subsequently proposed that special access interconnection be implemented concurrently with the common/dedicated rate structure proposed in the transport proceeding.[48] USTA also urges the Commission to institute promptly a comprehensive access charge reform proceeding designed to reduce LEC regulation.[49] USTA argues that the revised access charge structure resulting from the comprehensive access reform proceeding should be adopted at the same time as expanded interconnection for switched transport.[50]

22. Most IXCs generally argue that the Commission should conduct proceedings addressing access charge reform issues before or in conjunction with implementing expanded interconnection for special access or switched transport.[51] They differ, however, on whether expanded interconnection for special access and switched transport should be considered simultaneously.[52]

23. The CAPs and users argue that the Commission should not delay the introduction of expanded interconnection for special access pending a broader access restructure proceeding.[53] They also dispute the LEC contentions that switched and special access are so cross-elastic that the Commission must act on special and switched transport interconnection simultaneously.[54] Teleport suggests that we move swiftly to implement expanded interconnection for both special access and switched transport, requiring CAPs to employ the same terms and rate structure as the LECs until the Commission resolves the transport pricing issues.[55] CAPs strongly oppose referral of separations issues to a Joint Board before the Commission decides expanded interconnection issues, and MFS adds that the Commission should

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48 USTA Ex Parte (June 22, 1992); USTA Ex Parte (July 1, 1992).

49 USTA Ex Parte (Feb. 21, 1992).

50 USTA Ex Parte (June 22, 1992); USTA Ex Parte (July 1, 1992).

51 See, e.g., MCI Comments at 30-31; MCI Reply Comments at 75; Allnet Comments at 7-8; Sprint Comments at 8-9; Sprint Reply Comments at 2-12. While AT&T advocates implementation of a cost-causative local transport rate structure before implementation of expanded interconnection for switched services, its primary focus appears to be on eliminating the need for a contribution charge. AT&T Comments at 11-14.

52 Compare MCI Comments at 31-33 with Sprint Comments at 4-8 and Sprint Reply Comments at 2-9.

53 See, e.g., MFS Reply Comments at 10-13; Ad Hoc Reply Comments at 28-30; GSA Reply Comments at 3-5; ICA Reply Comments at 3-6; Teleport Reply Comments at 2-8; Electric Lightwave Reply Comments at 1.

54 See, e.g., MFS Reply Comments at 18-23; Teleport Reply Comments at 3-8.

55 Teleport Comments at 40-45; Teleport Reply Comments at 3-8.

expressly determine that this is not a proceeding in which such referral is mandatory under Section 410(c).[56]

24. NTIA argues that the Commission should consider expanded interconnection for special access and switched transport in a carefully coordinated fashion given the cross elasticity of demand between the two services. It urges the Commission to adopt a Notice of Proposed Rulemaking promptly proposing expanded interconnection for switched transport.[57]

25. Discussion. We recognize the relationship between expanded interconnection and other access and separations issues, and are committed to considering these issues in an integrated fashion. Despite this, we do not believe that expanded interconnection issues should be incorporated in a broader proceeding and considered at the same time as other access charge reform issues. While we will need to consider broader access reform as competition develops, this is not necessary before implementing expanded interconnection for special access in light of existing LEC pricing flexibility and the additional measures adopted in this Order.

26. Although some cross-elasticity exists between special and switched access, we need not delay acting on special access expanded interconnection until we have completed the comprehensive proceeding advocated by some parties. There has been a significant pricing disparity between special and switched access services for many years that, as noted by a number of the commenting parties,[58] already has caused significant migration by large users. There is no credible showing in this record that significant additional migration will occur with the implementation of expanded interconnection for special access. Indeed, based on the position taken in USTA ex parte filings, it appears that the Tier 1 LECs affected by this proposal agree with our conclusion that we can adopt special access expanded interconnection before adopting expanded interconnection for switched transport.[59]

27. As discussed in greater detail below, we are referring certain separations issues raised by expanded interconnection to the Joint Board in

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56 MFS Reply Comments at 13-17. See also Ad Hoc Comments at 35 (asserting that separations impacts are unlikely).

57 NTIA Reply Comments at 21-24.

58 See, e.g., Teleport Reply Comments at 3-8; MFS Reply Comments at 19-23.

59 The comprehensive plan submitted by USTA proposes that the Commission proceed with an order on special access interconnection, but postpone implementation of expanded interconnection for switched transport. USTA Ex Parte (Mar. 3, 1992) and USTA Ex Parte (June 22, 1992).

CC Docket No. 80-286.[60] We believe, however, that the Joint Board will be better able to develop appropriate implementing separations changes after we have adopted an expanded interconnection architecture and rate structure. We do not find the contentions that there would be separations effects sufficient to warrant delay pending development of Joint Board recommendations. While we are aware of the potential implications of this proceeding for state regulatory choices, we do not believe that the non-separations issues here should be referred to a Joint Board. Among other things, such a referral would delay implementation of special access expanded interconnection.

28. In light of the potential benefits, we conclude that the Commission should move forward to adopt rules for special access expanded interconnection without further delay.[61] While other access and separations issues will be considered in separate proceedings, those decisions will fully reflect our actions on expanded interconnection, and the realities of growing access competition.[62]

IV. INTERCONNECTION ARCHITECTURE

29. Notice. We tentatively concluded that we should require implementation of expanded interconnection for special access, but allow each LEC to decide whether to satisfy this requirement through virtual or physical collocation. Our purpose in defining the rights of interconnecting parties was to achieve the major benefits of physical collocation while permitting the LECs a viable choice between physical and virtual collocation.[63] Thus, under virtual collocation arrangements, we proposed to allow interconnecting parties to monitor and control their circuits terminating in the LEC central office. In addition, we tentatively concluded that LECs should be under an obligation to make reasonably available central office electronic equipment designated by interconnectors.

30. Comments. The LECs argue that the Commission should permit them to decide whether to provide physical or virtual collocation, stating

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60 See infra ¶¶ 247-48; Expanded Interconnection with Local Telephone Facilities, Second Notice of Proposed Rulemaking, FCC 92-441, CC Docket No. 91-141, at ¶¶ 54-55 (adopted Sept. 17, 1992) (Second Notice).

61 Today, we also have proposed extending expanded interconnection to the provision of switched transport, and have adopted an order modifying the rate structure and pricing of LEC-provided switched transport. See Second Notice; Transport Rate Structure and Pricing, FCC 92-442, CC Docket No. 91-141 (adopted Sept. 17, 1992) (Transport Order).

62 The Commission has ample authority to conduct its proceedings in this fashion pursuant to Section 4(j) of the Communications Act, 47 U.S.C. § 154(j).

63 Notice, 6 FCC Rcd at 3261-62, ¶¶ 17-18.

that virtual collocation would meet the Commission's goals.[64] Several LECs also contend that virtual collocation arrangements should not have to be technically and economically equal to the LECs' own interconnections.[65] Although some LECs state that they would choose physical collocation at the majority of their central offices,[66] the LECs generally claim that the choice should reflect the circumstances in individual central offices, including space availability, office design, security, equipment type, power requirements, and staffing. GTE, for example, argues that there would not be sufficient space for physical collocation in certain new offices.[67] A number of LECs also argue that they should not be required to provide both physical and virtual collocation.[68] In addition, many LECs argue that the Commission does not have authority under Section 201(a) of the Communications Act to order physical collocation because the lease of central office space is not a communications service, and that the Commission does not have power to govern interconnection arrangements between carriers and noncarriers.[69]

31. A number of the state commissions generally support giving LECs the option of providing physical or virtual collocation rather than mandating physical collocation.[70] Illinois, for example, has approved an intrastate virtual collocation arrangement between Illinois Bell and Teleport.[71] Several states also argue that virtual interconnectors should receive the same pricing and other rights as physical interconnectors.[72]

32. In their original comments, most CAPs argue that the Commission should require LECs to provide physical collocation unless the LECs can demonstrate that insufficient space exists in a given central

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64 See, e.g., Ameritech Reply Comments at 13-19; BellSouth Comments at 48-49, 52-54.

65 See Ameritech Reply Comments at 24-30. See also BellSouth Comments at 52-53; BellSouth Reply Comments at 15.

66 See, e.g., Pacific Reply Comments at 75-81; Cincinnati Bell Comments at 7. See also NYNEX Comments at 11-14.

67 GTE Reply Comments at 61-64 & App. F. See also GTE Comments at 31-33; Rochester Reply Comments at 12-14.

68 See, e.g., NYNEX Comments at 11-12; Pacific Reply Comments at 75-81.

69 See, e.g., Pacific Comments at 68-70; Pacific Reply Comments at 97-98; Rochester Comments at 9-11. The small LECs generally do not address the issue of legal authority to mandate physical collocation.

70 See, e.g., Florida Comments at 4-5; Illinois Comments at 3-4; Michigan Comments at 5; New York Comments at 8-9.

71 Illinois Comments at 6.

72 See, e.g., New York Comments at 8-10; Florida Comments at 5-6.

office.[73] In conjunction with this, the CAPs generally contend that interconnection arrangements should be technically and economically comparable to the interconnections LECs provide themselves. Several argue that virtual collocation would create so many administrative problems and inefficiencies that it would be impossible to design a virtual collocation arrangement equivalent to physical collocation.[74] These CAPs also allege that virtual collocation will increase the potential for disputes between the LECs and CAPs. While citing physical collocation as the ideal, Teleport recognizes that certain forms of virtual collocation can satisfy interconnector needs.[75] Most of the CAPs, including Teleport, subsequently submitted an ex parte document proposing that CAPs be entitled to choose between physical and virtual collocation.[76]

33. Non-dominant IXCs, large users, enhanced service providers, and IDCMA generally urge the Commission to mandate physically collocated interconnection and to permit virtual collocation only if the LEC demonstrates that physical collocation at a particular central office is impossible.[77] They state that physical collocation is feasible,[78] and several assert that this is the best way to ensure that the LECs provide interconnection on the same terms and conditions that they provide interconnection to themselves.[79]

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[73] See, e.g., Locate Comments at 13-14; IDA Comments at 6; Teleport Denver Comments at 6-7; Penn Access Comments at 2-3; ALTS Comments at 15-21; ICC Comments at 2-13; MFS Comments at 29-31; Intermedia Reply Comments at 1. See also MetroComm Comments at 2.

[74] See, e.g., MFS Comments at 29-41; IDA Comments at 6-9; ICC Comments at 4-8; McCaw Reply Comments at 9-16. In particular, MFS argues that the time required to train LEC employees to install, maintain, and repair CAP equipment will delay implementation of initial service and subsequent equipment upgrades. MFS Comments at 31-37.

[75] Teleport Comments at v. See also Teleport Comments at 22-33.

[76] ALTS Ex Parte at 1 (Mar. 30, 1992).

[77] See, e.g., WilTel Comments at 17; MCI Reply Comments at 56; AAR Comments at 8-10; API Comments at 14-17; Bankers Comments at 9-14; EDS Comments at 5; GSA Comments at 7-8; ICA Comments at 5-7; UTC Comments at 3-6; IDCMA Comments at 5-8. API also alleges that virtual collocation would compromise route diversity. API Comments at 15-16. Compuserve contends that users should be able to choose between physical and virtual collocation. CompuServe Comments at 6.

[78] See, e.g., MidAmerican Comments at 6-7; WilTel Comments at 7; WilTel Reply Comments at 5; CompTel Reply Comments at 17.

[79] See, e.g., MCI Comments at 7; CompTel Comments at 13. See also MidAmerican Reply Comments at 4-5. For example, some IXCs suggest that LECs could abuse their control over the installation and maintenance of

34. NTIA believes that the Commission should mandate expanded interconnection, but need not specify a single interconnection arrangement. Instead, it argues that we should allow LECs and interconnectors to negotiate mutually acceptable arrangements on an individual case basis,[80] which would be tariffed to facilitate regulatory review and enforcement of nondiscrimination requirements.[81] The SBA and Justice urge the Commission to require LECs to provide physically collocated interconnection,[82] with Justice arguing that there would be a greater potential for LEC discrimination against competitors under virtual collocation than under physical collocation.[83]

35. Many of the LECs generally concede that virtually collocated interconnectors should be able to specify equipment that meets certain objective standards, so long as they absorb all the costs associated with installation and maintenance, including training of LEC personnel.[84] Some LECs suggest that interconnectors be required to select equipment from a list of products approved by the LEC.[85] USTA argues that LECs should be allowed to develop equipment specification standards on a voluntary basis, rather than under mandatory rules imposed by the Commission.[86]

36. A number of the LECs are willing to allow interconnectors to monitor and control their equipment remotely under virtual collocation, as long as the interconnectors pay associated costs.[87] SW Bell, on the other

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competitors' interconnection facilities and could impose delays, provide degraded service, or obtain sensitive information. See, e.g., WilTel Comments at 15-17; MidAmerican Comments at 6-7; MCI Reply Comments at 54-56.

80 NTIA Reply Comments at 9-12.

81 Id. at 10-12.

82 Justice Reply Comments at 33-39; SBA Comments at 21-22 (SBA recognizes, however, that virtual collocation may be appropriate if there are space or security problems with physical).

83 Justice Reply Comments at 34-37.

84 See, e.g., Bell Atlantic Comments at A-6-7; Pacific Comments at 75; Ameritech Comments at 64; Rochester Comments at 13-15; United Comments at 5-6. See also SW Bell Comments, App. C at 14-15; Lincoln Comments at 7; USTA Comments at 21-26; SNET Comments at 13-14.

85 U S West Comments at 32 & n.56; BellSouth Comments at 58; BellSouth Reply Comments at 15 n.31; GTE Comments at 35.

86 USTA Comments at 21-26.

87 See, e.g., Bell Atlantic Comments at A-8; Pacific Comments at 73; BellSouth Comments at 59-60; GTE Comments at 36-37; Rochester Comments at 16.

hand, argues that given the LECs' technical abilities, monitoring and control by interconnectors is neither desirable nor necessary.[88]

37. The CAPs, IXCs, users, and state commissions support the Commission's proposal that LECs be required to make available central office electronic equipment designated by interconnectors under virtual collocation.[89] MFS and Locate argue that the LEC should bear any additional costs resulting from equipment designation, such as training LEC personnel to install, maintain and repair unfamiliar equipment.[90] AT&T, however, believes that additional costs should be borne by interconnectors.

38. The CAPs, IXCs, users, and most state commissions contend that interconnectors' ability to monitor and control the electronic equipment dedicated to their use is important to facilitate competitive provision of high capacity circuits.[91] According to Teleport, monitoring and control is vital because it permits the company to maintain its quality and reliability standards, and assists in controlling costs. The CAPs also argue that monitoring and control reduce the potential for conflicts of interest that would exist if the LECs could control the operational and technical characteristics of interconnected circuits. Users state that interconnectors should be allowed to monitor and control interconnected circuits in order to detect and correct service problems. Justice also supports interconnector monitoring and control.[92]

39. Discussion. Based on the record developed in this proceeding, it is evident that almost all interconnectors believe strongly that physical collocation best ensures that they are provided interconnection on the same terms and conditions as the LECs interconnect their own circuits. The Commission is committed to ensuring fair opportunities for all market participants, including interconnectors, to compete in providing access

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88 SW Bell Comments, App. C at 18-19.

89 See, e.g., Locate Comments at 38; Teleport Denver Comments at 8; FMR Comments at 16; ALTS Comments at 20-21; MFS Comments at 63-65; Teleport Comments at 13, 25-28; AT&T Comments at 15; MCI Comments at 34; WilTel Comments at 11-13; Ad Hoc Comments at 26; Bankers Comments at 14-15; IDCMA Comments at 17-18; SBA Comments at 26; Florida Comments at 6; Illinois Comments at 6-7.

90 MFS Comments at 63-65; Locate Comments at 38-39. Locate also argues that LEC charges for installation, maintenance and repair should reflect CAP wage rates. Id.

91 See, e.g., Teleport Comments at 25-28; MFS Comments at 61-62; MFS Reply Comments at 36 n.32; ALTS Comments at 20-21; FMR Comments at 16; WilTel Comments at 11-14; MCI Reply Comments at 57; Ad Hoc Comments at 25-26; Bankers Comments at 15; EDS Comments at 6-7; GSA Comments at 9; SBA Comments at 25-26; Florida Comments at 5; New York Comments at 9.

92 Justice Reply Comments at 43-45.

services. For this reason, interconnectors should have the right to obtain physical collocation from LECs. We therefore require the LECs subject to this Order to make physical collocation available to all interconnectors that request it. Under this form of collocation, the interconnecting party pays for LEC central office space in which to locate the equipment necessary to terminate its transmission links, and has physical access to the LEC central office to install, maintain, and repair this equipment.[93]

40. The parties remain free, under our approach, to negotiate satisfactory virtual collocation arrangements if such arrangements are preferable to physical collocation from the point of view of both parties. We also believe that interconnectors using virtual collocation arrangements should be guaranteed certain minimum standards. Our approach allows and encourages the parties -- since they are in the best position to negotiate the specifics of a collocation arrangement -- to adapt their arrangements as necessary to reflect differing physical and technical conditions. Thus, although all interconnectors will have a right to physical collocation if they choose, we envision that LECs and interconnectors may be able to negotiate virtual collocation arrangements sufficiently comparable in quality to physical collocation that interconnectors may choose virtual rather than physical collocation.[94]

41. Based on the record before us, we can envision only two reasons that would justify granting a LEC an exemption from the requirement that it make the option of physical collocation available.[95] The first would be a demonstration by the LEC that a particular central office lacks

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93 When the Commission considered similar collocation issues in the Computer III and Open Network Architecture proceedings, we rejected proposals for mandatory collocation of enhanced service provider equipment in Bell Operating Company (BOC) central offices. We found that voluntary BOC use of price parity rules, a form of virtual collocation, fully addressed the competitive needs demonstrated by enhanced service providers. See infra ¶¶ 93-94. The circumstances in Computer III are clearly distinguishable from those before us in this proceeding. Here, the transmission equipment owned or used by the interconnector must, as a technical matter, be located in the LEC central office in order to terminate the interconnector-provided circuit at that location. By contrast, the enhanced service equipment at issue in Computer III could readily be located outside the LEC central office and achieve technical comparability with LEC enhanced service equipment located inside the central office.

94 See infra ¶¶ 219-40 (discussing our legal authority to order the LECs to make physical collocation available to interconnectors that request it.)

95 We delegate authority to the Chief, Common Carrier Bureau, to act on requests for exemption from this requirement. The Bureau Chief is also delegated authority to establish pleading cycles and other procedures designed to facilitate efficient and timely review of exemption petitions.

physical space to accommodate physical collocation.[96] The second would be a formal decision by a state legislature or public utility regulatory agency, after proceedings allowing all interested parties a reasonable opportunity to be heard, in favor of virtual collocation rather than physical collocation for intrastate expanded interconnection, or in favor of allowing LECs to choose which form of interconnection to use for intrastate expanded interconnection. Exemption requests based on such final state decisions must be submitted by the date for filing the interstate tariffs required by this Order.[97] We are allowing this limited exemption to accommodate the states to the extent possible, consistent with our federal policy in favor of physical collocation. After the filing of the interstate tariffs, however, the balance of relevant interests shifts in favor of according greater protection to interconnectors' expectations regarding the type of interconnection that will be available. We note that this is the only instance in which the Commission's interest in ensuring physical collocation for interstate services should give way to a state's preference for virtual collocation.[98]

42. We believe that this approach will have a number of significant benefits. It will ensure that the interconnection available to interested parties is comparable to that used by the LEC for its own circuits. In particular, making physical collocation available will avoid the operational differences inherent in virtual collocation, where the interconnector is forced to rely on its LEC competitor for installation, maintenance, and repair. This approach will also reduce the potential for regulatory disputes and delay that may result under virtual collocation. At the same time, it will permit interconnectors and the LECs ample opportunity to negotiate virtual collocation arrangements. This approach also permits us to reduce the potential for conflict with state policies while providing important protections for interconnectors.

43. Consistent with this approach, we are also imposing specific conditions on LEC provision of virtual collocation in order to minimize any technical differences between physical and virtual collocation. We believe

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[96] See infra ¶¶ 77-80 (requirement that LECs make virtual collocation available in any central office in which space for physical collocation has been exhausted) and ¶ 260 (procedures applicable to exemption petitions). Space limitations may arise in certain central offices built after the downsizing of electronic switching equipment, which are typically smaller than those constructed to accommodate earlier generations of central office equipment.

[97] Exemption requests must include a copy of the final state decision. State public utility regulatory agency decisions approving LEC/CAP settlement agreements providing for intrastate implementation of virtual collocation will not by themselves be deemed formal decisions in favor of virtual collocation or LEC choice of interconnection architecture for this purpose.

[98] After the filing of the LECs' interstate expanded interconnection tariffs, interested parties would remain free to petition for waiver of our general physical collocation requirement based on unique circumstances.

that this is necessary since virtual collocation will be the only option available to interconnectors in certain offices. It will also protect interconnectors in central offices where space is exhausted before all interested parties are accommodated. We also believe that interconnectors desiring virtual collocation should be guaranteed certain minimum standards for their interconnection arrangements.

44. We conclude that interconnectors using virtual collocation arrangements should be allowed to designate the central office transmission equipment dedicated to their use,[99] as well as monitor and control their circuits terminating in the LEC central office.[100] Under expanded interconnection, the central office electronics dedicated to the interconnector's use is an integral part of the interconnected circuit. Equipment designation will give interconnectors greater flexibility in ensuring compatibility between their network equipment and the central office equipment dedicated to their use. We see no reason to limit interconnector equipment selections to a list developed by the LEC, although the designated equipment must meet applicable fire and safety codes.[101] While interconnector designation of numerous types of equipment unfamiliar to LEC technicians theoretically could impose unreasonable burdens on the LECs, we believe that this is unlikely. We also conclude that the LECs should be permitted to require that an interconnector bear any additional costs

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99 Thus, the equipment used to terminate interconnected circuits would be located in the LEC central office under both virtual and physical collocation.

100 Several parties also cite a desire for financial arrangements governing lease or ownership of interconnector central office electronics and interconnecting fiber that replicate the ownership benefits of physical collocation. For example, in certain state collocation arrangements, the CAPs sell or lease their designated central office equipment to the LEC with the LEC recouping these costs from the CAP and also charging the CAP for installation, maintenance, repair, and other operating expenses. We are leaving the terms associated with the provision of central office electronics to be negotiated between the LEC and the interconnector. Those negotiated terms will, however, be reviewed in the tariff review process.

101 Additionally, we will require interconnectors to comply with any rules adopted by the Commission based on the "best practices" and related network integrity and operational safeguards now being developed under the aegis of the Commission's Network Reliability Council (of which several CAPs as well as major users and user groups are members). It is important that no steps be taken which could affect the high level of network reliability currently enjoyed by telephone subscribers generally. In the unlikely event that interconnector-designated equipment or operating practices represented a significant and demonstrable technical threat to the LEC network, moreover, the LEC would be allowed to proscribe use of such equipment or practices. We will scrutinize any such instances brought to our attention carefully, however, and expect them to be rare.

reasonably incurred by the LECs as a result of the interconnector's choice of equipment.[102]

45. We conclude as well that safeguards are necessary to protect against possible LEC discrimination in installation, maintenance, and repair of interconnector-designated equipment under virtual collocation. We require that the LECs, at a minimum, install, maintain and repair interconnector equipment under the same time intervals and with the same failure rates that apply to the performance of similar functions for comparable LEC equipment.[103] To provide a foundation for evaluating possible complaints, we

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[102] In the Notice, we sought comment on what network disclosure rules should apply to electronic equipment provided by LECs and designated by interconnectors in virtual collocation arrangements. Notice, 6 FCC Rcd at 3263 n.23. Several parties submitted comments on this issue. See Bell Atlantic Comments at A-3 to A-4; BellSouth Comments at 61-64; GTE Comments at 36; USTA Comments at 26-28; NYNEX Reply Comments at Exh. 18; Ameritech Comments at 67-69; Ameritech Reply Comments at 38-40; U S West Comments at 31-37; Rochester Comments at 14-15; IDCMA Comments at 18-21; IDCMA Reply Comments at 22-31; NATA Reply Comments at 1-8; ICC Comments at 17-18; MCI Comments at 8-10; Florida Comments at 6-7; Illinois Comments at 6-7.

Our Part 68 rules require the LECs to disclose information regarding their network interfaces with interconnectors at the cross-connect point. 47 C.F.R. § 68.110. Under virtual collocation, interconnectors will designate the type of electronic equipment used in the central office for termination of their circuits. As a result, we find that the LECs' network disclosure obligations do not apply to the electronic equipment designated by an interconnector under virtual collocation arrangements. Carriers other than the LECs are subject to independent network disclosure requirements, however. See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Reconsideration Order, 84 FCC 2d 50, 82-83 (1980), aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983); Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5911 n.270 (1991), recon., 6 FCC Rcd 7569 (1991), recon., 7 FCC Rcd 2677 (1992), pets. for recon. pending (Interexchange Order). Thus, carriers interconnecting with the LECs pursuant to expanded interconnection will have to disclose certain network information concerning the equipment that they place, or designate for placement, in the LEC central office. Moreover, we believe that interconnectors will have an economic incentive to select equipment that is compatible with CPE possessing standard interfaces. We believe that this simply clarifies the existing network disclosure requirements, and that no revision of the rules is necessary.

[103] One CAP, Locate, argues that LECs should be required to install, maintain, and repair equipment dedicated to CAPs according to performance standards established by interconnectors. Such a requirement would be unreasonably burdensome, as it could require LECs to maintain and repair their competitors' equipment faster and more effectively than the LECs maintain and repair their own. While we do not believe that this standard is

will require LECs to keep records and file reports annually on the installation, maintenance, and repair times for comparable LEC and interconnector equipment and circuits.[104] In the unlikely event that problems develop with LEC installation, maintenance, and repair under virtual collocation, we will take corrective action.

46. Interconnector monitoring and control is critical for interconnector maintenance of quality standards because it permits the CAP to detect and correct service problems on its interconnected circuits. The Commission has previously recognized the importance of monitoring and control in the context of ONA and state expanded interconnection arrangements also generally allow monitoring and control.[105] As the LECs have failed to present persuasive reasons for preventing interstate special access interconnectors from performing this function for themselves, we conclude that they should be allowed to do so under virtual collocation.

V. AVAILABILITY OF EXPANDED INTERCONNECTION

A. Parties Who Must Provide Expanded Interconnection

47. Notice. We tentatively concluded that our proposed expanded interconnection rules should apply only to Tier 1 LECs. We also asked for comment on the desirability of developing criteria for excluding sparsely populated service areas of Tier 1 LECs from the requirement and invited parties proposing broader application of expanded interconnection obligations to address the effects on smaller LECs.

48. Comments. The LECs generally agree with our proposal that all non-Tier 1 LECs be exempted from mandatory implementation of expanded interconnection. The LECs have different viewpoints, however, regarding which Tier 1 LECs or Tier 1 LEC territories, especially rural areas, should be exempt from expanded interconnection. Pacific, for example, argues that LECs serving sparsely populated areas should be excluded from general tariffing requirements, required to comply with collocation guidelines only upon bona

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necessary to satisfy the legitimate needs of interconnectors, LECs and interconnectors, of course, are free to negotiate such terms for virtual collocation on their own. Interconnectors can achieve a high level of reliability through the use of electronics with redundant components, and monitoring and control, rather than through expedited repair procedures. In addition, we note that by interconnecting with the LEC network rather than bypassing it entirely, interconnectors are, in essence, accepting LEC performance standards on the LEC circuit to which they are connected.

104 We delegate authority to develop the detailed requirements for these reports to the Chief, Common Carrier Bureau.

105 The LECs, however, may provide monitoring and control functions for interested interconnectors.

fide request, and permitted to price on an individual case basis.[106] The Puerto Rico Telephone Company (PRTC) and USTA believe that NECA pool members should not be required to provide expanded interconnection because pool members do not have control over their special access rates and, therefore, would be unable to respond to competition from interconnectors.[107] Lincoln argues that rate of return carriers should be exempt from an expanded interconnection requirement because of the difficulty of creating a regulatory scheme that is both compatible with rate of return regulation and rate flexibility.[108] Lincoln also proposes that mandatory expanded interconnection be limited to exchanges of over 100,000 lines in a Metropolitan Statistical Area. That would allow interconnection in all major markets without forcing LECs to incur unreasonable costs to build new facilities in smaller exchanges where costs would exceed benefits.[109]

49. Cincinnati Bell requests that if the Commission implements collocation before resolving access charge and pricing flexibility issues, it initially exclude small to medium-sized LECs, such as Cincinnati Bell, which serves only one urban center and is more vulnerable to competition.[110] NYNEX and Rochester, on the other hand, assert that there may be demand for collocation in rural areas and, therefore, argue that LECs should be required to offer expanded interconnection in both urban and suburban areas.[111] Rochester and USTA argue that non-Tier 1 LECs and certain smaller Tier 1 LECs should be exempt.[112] SW Bell is concerned that our proposal may be detrimental to non-Tier 1 LECs.[113]

50. Some CAPs suggest that all LECs should be subject to interconnection rules for all service areas, subject to a waiver procedure in which LECs would have the burden of proof.[114] Most potential interconnectors generally argue that non-Tier 1 LECs should be covered by the Commission's proposed rules. MFS, for example, contends that all LECs, including PRTC, should be required to provide expanded interconnection and that rural portions of Tier 1 LEC service areas should not be exempt from the

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106 Pacific Comments at 76-79; Pacific Reply Comments at 101-02.

107 PRTC Comments at 1-4.

108 Lincoln Comments at 4-5.

109 Lincoln Comments at 3-4.

110 Cincinnati Bell Reply Comments at 10-11 n.23 & 25-26.

111 NYNEX Comments at 23; Rochester Comments at 18 n.22.

112 Rochester Comments at 18-19; USTA Comments at 38-39; USTA Reply Comments at 16-17.

113 SW Bell Comments at 41-42.

114 See, e.g., ICC Comments at 19-20; ALTS Comments at 27.

collocation requirement.[115] Teleport Denver, on the other hand, believes that the interconnection proposal should apply to all Tier 1 LECs, but only on a voluntary basis to smaller LECs.[116] FMR supports initially limiting the requirement to Tier 1 LECs if that would speed the provision of expanded interconnection. It also requests that the Commission simultaneously establish a framework for third parties to request interconnection from other LECs, especially those already providing high-capacity services, to ensure that the Commission does not artificially limit availability of expanded interconnection services.[117]

51. MCI asserts that expanded interconnection requirements should apply to Tier 1 LECs in all locations.[118] Long Distance North argues that limiting expanded interconnection requirements to metropolitan areas would be arbitrary and discriminatory because interconnection facilities are identical regardless of location.[119] General Communication, Inc. states that small LECs may have the technical capability to offer expanded interconnection, and argues that those with the capability should be required to do so.[120] MCI proposes that if the interconnection requirements are relaxed in sparsely populated areas, expanded interconnection should still be required upon bona fide request in rural areas.[121] MCI also argues that LECs should not be granted reciprocal interconnection rights to CAP networks.[122]

52. Users agree that all Tier 1 LECs should have universal interconnection obligations,[123] and that expanded interconnection should cover rural areas.[124] Ad Hoc argues that smaller carriers should be required to honor reasonable requests for collocation absent a showing of hardship.[125]

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115 MFS Comments at 68-70; MFS Reply Comments at 53-54 & n.53.

116 Teleport Denver Comments at 10.

117 FMR Comments at 18.

118 MCI Comments at 19-20. See also Long Distance North Comments at 1-5.

119 Long Distance North Comments at 2.

120 GCI Comments at 2-4; GCI Reply Comments at 2-4.

121 MCI Comments at 20.

122 MCI Reply Comments at 67-68.

123 See, e.g., Ad Hoc Comments at 26-27; API Comments at 12-14; UTC Comments at 7-9; GSA Comments at 11-13.

124 See, e.g., API Comments at 12-14; Pennsylvania Consumer Advocate Comments at 2-3; Wells Rural Electric Comments at 6-7.

125 Ad Hoc Comments at 27.

GSA, UTC and API contend that expanded interconnection rules should apply to all LECs, including small LECs, arguing that even many small LECs have sophisticated facilities and that customers of small LECs should not be deprived of the benefits of interconnection.[126] GSA suggests that LECs be entitled to seek waivers for specific problems (e.g., space limitations) to postpone expanded interconnection until the underlying problem is resolved.[127] GSA also contends that NECA could continue to pool the unbundled connection charge and that the overall effect of expanded interconnection on pooling companies including PRTC, would be negligible.[128]

53. Small LECs argue that expanded interconnection requirements should not apply either to small LECs or to Tier 1 LECs in rural areas or in Puerto Rico because of the potential adverse effects on universal service and infrastructure development and because demand for collocation is likely to be limited in rural areas.[129] TDS specifically states that rural areas often have only one or two large business customers, adding that the diversion of these customers' traffic would have a far greater impact than loss of one or two customers in an urban area.[130]

54. Several states agree that expanded interconnection should apply to all Tier 1 LECs in all areas, including rural areas.[131] Michigan argues that all carriers, including CAPs and small LECs, should be required to provide physically and/or virtually collocated interconnection.[132]

55. The SBA opposes applying expanded interconnection requirements to small LECs, but supports applying the requirements to Tier 1 LECs in all

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126 GSA Comments at 11-13; UTC Comments at 7-9; API Reply Comments at 17-19.

127 GSA Comments at 11-13.

128 GSA Reply Comments at 8-9.

129 See, e.g., TDS Comments at 8, 15-21; TDS Reply Comments at 27-30; OPASTCO Comments at 2-6; NECA Comments at 2-3; NECA Reply Comments at 1-4; NTCA Reply Comments at 2-5; Matanuska Telephone Association Reply Comments at 1-3; Anchorage Telephone Utility Reply Comments at 1-5; Fairbanks Municipal Utilities System Reply Comments at 1-3; Kansas Independent Rural Telephone Companies Reply Comments at 3-4.

130 TDS Reply Comments at 28.

131 See, e.g., Illinois Comments at 10-11; Florida Comments at 10.

132 Michigan Comments at 6-7.

areas.[133] NTIA argues that interconnection rights should be reciprocal among common carriers.[134]

56. Discussion. While requiring all LECs to provide expanded interconnection would ensure that customers in all areas can benefit from expanded interconnection, it is unlikely that there would be great demand for expanded interconnection in the smaller LECs' service areas, at least in the near term. Requiring smaller LECs to offer expanded interconnection might also tax their resources and harm universal service and infrastructure development in rural areas. We believe that the demand for expanded interconnection that does exist in rural areas typically would come from a single large user. The use of expanded interconnection offerings by such customers could create substantial stranded LEC investment that could not readily be reused, possibly threatening the economic viability of a small LEC.[135]

57. We therefore adopt our proposal to limit the requirement to Tier 1 LECs. This would ensure the availability of expanded interconnection in most urban and suburban areas where demand is likely to be greatest. We also conclude that NECA pool members should be excluded from expanded interconnection requirements, at least for the present. Since the Puerto Rico Telephone Company is the only Tier 1 LEC that also is a NECA pool member, this is not much more restrictive than requiring all Tier 1 LECs to provide expanded interconnection. At this time, we are not convinced that it would be beneficial to require a pool carrier, which has limited pricing flexibility, to provide expanded interconnection. It might cause that member's contribution to the pool to decrease, put upward pressure on the pool's access rates, reward less efficient CAPs, and cause the pool carriers' ratepayers to bear the burden of stranded plant. The inclusion of non-Tier 1 LECs that are NECA pool members within the expanded interconnection requirement also could create these problems. We may revisit this decision to exclude NECA pool members after we have an opportunity to observe the effect of expanded interconnection on other LECs. We see no reason, however, to exclude rate of return Tier 1 carriers not in the NECA pool from the obligation to provide expanded interconnection. We believe that rate of return carriers will have sufficient flexibility to respond to competitors' offerings, particularly in light of the measures we are adopting to permit a system of density pricing zones.[136]

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133 SBA Comments at 18-20.

134 NTIA Reply Comments at 12-13.

135 While large customers currently can bypass the LEC entirely using non-LEC facilities from their premises to the end point of the circuit, expanded interconnection makes the use of non-LEC alternatives more attractive to a greater range of customers by allowing substitution of alternative facilities for selected portions of the LEC network.

136 We also note that the Commission's rules applicable to rate of return LECs do not specify cost allocation procedures for individual special access offerings, although the rules do specify the method for allocating

58. We also will not exempt Tier 1 LECs from providing expanded interconnection in sparsely populated areas. It would be difficult to establish a standard to delineate exempt areas, especially when the record is not very helpful on this point.[137] The potential economic consequences of including rural areas served by Tier 1 LECs are less significant than the possible impact of expanded interconnection on smaller, non-Tier 1 LECs. For example, a Tier 1 LEC's customer and geographic mix usually includes substantial numbers of mid-size business and residential customers in suburban areas -- a source of potential revenue that is often not available to smaller LECs. Thus, a Tier 1 LEC is rarely as heavily dependent on a single large business customer to support high cost rural customers as a smaller LEC may be.[138] Nor do we believe that Tier 1 LECs, such as Cincinnati Bell, which serve primarily urban areas, should be exempted from our expanded interconnection requirements given the potential demand for this service in their territory.

B. Parties Entitled to Expanded Interconnection

59. Notice. In the Notice, we proposed that expanded interconnection be made available to all third parties, regardless of classification, including CAPs, IXCs, end users, and any other entities.[139]

60. Comments. Justice and the majority of Tier 1 LECs agree that all parties should be entitled to expanded interconnection, and that the service should not be limited to CAPs.[140] MFS supports extending expanded

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costs to the overall category. Thus, while rate of return LECs must provide cost support for their special access filings, they need not use a particular cost allocation method. The degree of competition faced by a particular LEC is one factor that we would consider in determining the reasonableness of a proposed cost allocation method. The Commission is also considering increased pricing flexibility for the larger rate of return LECs. Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, Notice of Proposed Rulemaking, 7 FCC Rcd 5023 (1992).

137 While Lincoln proposes limiting the expanded interconnection requirements to exchanges of over 100,000 lines in a Metropolitan Statistical Area, we believe that such an exemption would be overly broad.

138 Therefore, we are not exempting Nevada Bell from the expanded interconnection requirements.

139 Notice, 6 FCC Rcd at 3264, ¶ 30.

140 See, e.g., Justice Reply Comments at 27-29; NYNEX Comments at 21; Ameritech Comments at 59; GTE Comments at 20-22; SW Bell Comments at C-11. Several of the LECs also argue that reciprocal collocation should be permitted, allowing LECs to resell portions of their competitors' networks. See, e.g., Bell Atlantic Comments at 13-14; Pacific Comments at 71; BellSouth Comments at 47-48; USTA Comments at 28-30.

interconnection to all third parties,[141] and DDI, another CAP, argues that the Communications Act mandates that interconnection be available to all entities.[142] MFS cautions, however, that in some instances it may be necessary to distinguish between end users and IXCs because carriers may need features that other interconnectors do not need.[143] Users argue that interconnection should be available to all parties, contending that any restriction would constitute unreasonable discrimination and would reduce the competitive benefits of the Commission's actions.[144] Some state commissions contend that all parties should be entitled to expanded interconnection for interstate special access,[145] and Florida suggests that providers such as power and cable television companies could provide beneficial competitive services to residential or small business customers.[146]

61. SNET, however, believes that in order to achieve the Commission's goal of enhancing competition, expanded interconnection must be limited to licensed CAPs.[147] Teleport Denver also argues that only CAPs, not users, should have access to collocated interconnection.[148] It believes that direct interconnection of users could stymie growth of the CAP industry.[149] Illinois recognizes that expanded interconnection is only available in Illinois to certified local exchange carriers such as Teleport, but argues

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141 MFS Comments at 65-68. See also PCNS-NY Comments at 6; Cellular Service, Inc. Comments at 1-6.

142 DDI Comments at 3-5.

143 MFS Comments at 66-67. As an example, MFS cites carrier signalling used with switched transport. Id.

144 See, e.g., Ad Hoc Comments at 26-27; AAR Comments at 6-7; API Comments at 9-11; Bankers Comments at 20; CompuServe Comments at 7-8; GSA Comments at 10-11; UTC Comments at 6-7.

145 See, e.g., Florida Comments at 8-10; Minnesota Commission Reply Comments at 6-7. See also Illinois Comments at 9-10 (IXC use of expanded interconnection would increase competition).

146 Florida Comments at 8-10.

147 SNET Comments at 14.

148 Teleport Denver Comments at 9-10. According to Teleport Denver, if users are permitted to collocate on the same terms as CAPs, the LECs would aggressively market interconnection services to their largest customers and quickly fill the available central office space. In addition, Teleport Denver argues that end user access termination is less efficient than collocation by a CAP serving many end users. Teleport Denver Reply Comments at 13-14.

149 Id.

that this is not inconsistent with the Commission proposal.[150] The SBA proposes if there is a space shortage in a LEC central office, common carriers should have priority over other parties.[151]

62. The IXCs generally agree that expanded interconnection should be available to all parties to prevent unlawful discrimination.[152] A number of the non-dominant IXCs argue, however, that restrictions should be placed on AT&T's ability to take advantage of expanded interconnection, so as to reduce what they view as AT&T's historical advantage flowing from the pre-divestiture structure.[153] CompTel asserts that AT&T currently enjoys unearned advantages over other IXCs because AT&T has many more POPs located close to or inside LEC central offices.[154] MCI alleges that 43% of AT&T's POPs share V & H coordinates with LEC central offices.[155] It asserts that the collocation of AT&T POPs in the same building as a LEC central office would unfairly allow AT&T to convert special access service to expanded interconnection, reducing its access costs unfairly and disrupting interexchange competition.[156]

63. These non-dominant IXCs suggest a variety of measures to remedy this problem. CompTel suggests that the Commission determine the extent to which AT&T already enjoys effective collocation at LEC central offices. Comptel also argues that the Commission should determine the residual access rates BOCs would be likely to charge other users to recover special access costs once AT&T migrates to collocated interconnection. CompTel suggests that, during a transition period, AT&T should be barred from access to expanded interconnection at LEC wire centers unless a competing CAP or IXC also is present.[157] MCI argues that, when already

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150 Illinois Comments at 9-10.

151 SBA Comments at 23-24.

152 See, e.g., MCI Comments at 19; Allnet Comments at 5; WilTel Comments at 6.

153 See, e.g., Allnet Comments at 2-4; CompTel Comments at 8-12; CompTel Reply Comments at 1-6; MCI Comments at 14-19; MCI Reply Comments at 16-28; WilTel Comments at 30-33.

154 CompTel Comments at 8-12; CompTel Reply Comments at 1-6.

155 MCI Comments at 16 & Exh. 1. V & H coordinates show the longitude and latitude of a given location, although points having the same V & H coordinates can be as much as one third of a mile apart. AT&T Reply Comments at 7 n.*.

156 MCI Comments at 15-16; MCI Reply Comments at 16-23. Accord CompTel Comments at 8-11; CompTel Reply Comments at 1-4; WilTel Comments at 30-32; WilTel Reply Comments at 16-20; WilTel Ex Parte (April 24, 1992).

157 CompTel Comments at 12.

collocated in a LEC central office, AT&T should not be permitted to take advantage of expanded interconnection for existing circuits, and should be allowed to use expanded interconnection for additional circuits at those offices only after expiration of a three year moratorium.[158] MCI suggests as an alternative that all IXCs located within five miles of a LEC central office where AT&T is collocated pay the same interconnection rate as AT&T for a three-year period.[159] WilTel also proposes a plan for restricting AT&T use of expanded interconnection for special access. It proposes implementing expanded interconnection pricing only after an access carrier has made a bona fide request for such service. Thereafter, expanded interconnection would be generally available, but, for a five year period, AT&T would be allowed to pay the reduced expanded interconnection rates only for new circuits.[160] Other non-dominant IXCs propose rate restrictions on AT&T or elimination of the "one-eighth mile" and "first-come, first-served" proposals.[161]

64. AT&T and a number of the LECs argue that expanded interconnection would not give AT&T a competitive advantage. AT&T asserts that the number of AT&T POPs located under Shared Network Facilities Arrangements (SNFAs) in BOC central offices has declined precipitously.[162] AT&T states that on a nationwide basis, 28% of its POPs are collocated with LEC central offices.[163] In addition, AT&T argues that the revised rate structure proposed in the Notice would provide no access cost advantage to AT&T because all parties would be required to pay the same charges for interconnection to LEC central offices. NYNEX argues that AT&T's facilities located in LEC buildings pursuant to SNFAs should not qualify for treatment as collocated facilities for purposes of expanded interconnection,[164] and Ameritech states that it would require AT&T to take virtual collocation through a manhole adjacent to the central office just like other interconnectors.[165]

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158 MCI Reply Comments at 17-23. In addition, MCI argues that AT&T should be required to access the central office through the same entrance point as other interconnectors, using the same interconnection facilities, and paying the same rates.

159 MCI Ex Parte at 2 (June 5, 1992).

160 WilTel Ex Parte at 4 (April 24, 1992).

161 See, e.g., CompTel Comments at 11-12; CompTel Reply Comments at 1-6; MCI Comments at 17-19; MCI Reply Comments at 21-28; Allnet Comments at 1-4.

162 Apparently, a significant number of arrangements permitting AT&T to locate POPs in the same buildings as LEC offices will continue for substantial periods of time, however.

163 AT&T Ex Parte at 2 (June 17, 1992).

164 NYNEX Reply Comments, Exh. 10 at 1-2. NYNEX contends that AT&T should receive the same treatment as other interconnectors. Id. at 2.

165 Ameritech Reply Comments at 37-38.

65. Discussion. We conclude that expanded interconnection for special access should be made available to all parties who wish to terminate their own special access transmission facilities at LEC central offices, including CAPs, IXCs, and end users. This approach is consistent with our policy of not distinguishing between carriers and end users in the access charge context. Permitting IXCs and end users to take advantage of expanded interconnection will increase competition by permitting more alternatives to LEC special access.[166] It also will help to bring the benefits of special access competition to customers in suburban and rural areas not served by CAPs and make it more difficult for LECs to increase rural rates above cost. We disagree with Teleport Denver's argument that we should sacrifice these benefits in order to foster CAP development by keeping out other potential competitors.[167]

66. The question remains, however, whether we should place restrictions on the ability of AT&T, and any other parties already located in the same building as a LEC central office,[168] to take advantage of expanded interconnection. We conclude that these parties should be required to interconnect with LEC facilities in the same manner as other interconnectors, using fiber optic facilities. We will not require that entities already located in the same building as a LEC central office actually route fiber optic facilities out of the building and back in through the same route used by other interconnectors, however, since that would use potentially scarce riser and cable vault space.[169] Requiring that AT&T and any other parties

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166 This decision reflects the Commission's commitment to promote competition in the telecommunications and the video marketplace. Cable companies will be able to compete in the interstate access market as access providers, while telephone companies have recently been granted authority to participate in the video marketplace through video dialtone. Telephone Company-Cable Television Cross-Ownership Rules, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 92-327 (released August 14, 1992).

167 A few parties argue that the Commission should require fully reciprocal interconnection rights for LECs and interconnectors. We believe that the CAPs should be willing to provide service to LECs on a voluntary basis, however, and see no reason to impose such requirements on them or other interconnectors since they do not control bottleneck facilities.

168 While this situation applies almost exclusively to AT&T, we are aware of several instances where other IXCs have similar arrangements. This discussion does not apply to entities currently collocated for the purpose of expanded interconnection.

169 Thus, parties already located in the same building as a LEC central office, for example, will be required to rent additional floor space and furnish it with appropriate electronic transmission equipment and fiber optic cable under physical collocation. Moreover, under physical collocation, we require that these parties' initial space preparation fees,

located in the same buildings as a LEC central office interconnect in the same manner as other parties ensures that all parties taking advantage of expanded interconnection will do so under the same general terms and conditions. This will help to eliminate the potential for special collocation deals for particular interconnectors.[170] We do not think, however, that it is appropriate to impose a "headstart" penalty on AT&T or other parties already located in the same building as a LEC central office by restricting their ability to take advantage of expanded interconnection for a fixed period of time or until another interconnector is collocated in the central office, as some parties have suggested. Nor do we believe that according other IXCs located within five miles of a LEC central office in which AT&T is collocated the same interconnection rate as AT&T is reasonable since that approach does not reflect the cost of serving these customers.

67. In particular, we do not believe that AT&T's large number of POPs and their proximity to LEC end offices and serving wire centers is an advantage that warrants broader restrictions on AT&T's use of expanded interconnection. AT&T's network architecture does mean that AT&T would incur fewer costs than other IXCs in building its own special access facilities to connect with the LECs under expanded interconnection. This is offset somewhat by the added capital costs that AT&T incurred when it put these facilities in place initially, and the additional operating expenses that they cause.[171]

68. Our decision to require designation of an interconnection point adjacent to the central office also reduces the potential benefits of

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in addition to covering the cost of preparing the interconnector's floor space, compensate the LEC for the cost of installing fiber optic cabling running from the entry point to the interconnector's designated floor space in the LEC central office. As a result, these parties will incur the same expenses as any other interconnector. Under virtual collocation, these parties are to pay for central office equipment dedicated to their use as well as charges to cover the cost of fiber optic cable from the entry point to the interconnector central office equipment. We believe that these restrictions are appropriate even through they force AT&T to forgo potential engineering efficiencies.

170 The LECs' incentives to offer individual parties particularly favorable expanded interconnection arrangements are relatively limited since any such arrangements would merely facilitate use by those parties of competitive alternatives to LEC access networks.

171 We also note that, in the Interexchange Order, with the exception of 800 service, the Commission was not persuaded by small IXCs' arguments in favor of placing various restrictions on AT&T's Basket 3 business services based on its inherent historical advantages. Instead, the Commission found that regulation of AT&T's Basket 3 business services -- which included virtually all AT&T services using LEC special access -- should be streamlined. We did not streamline AT&T's 800 service because of the lack of 800 number portability. Interexchange Order, 6 FCC Rcd at 5893-95, 5903-06.

having POPs located close to LEC central offices. Under the originally-proposed one-eighth mile standard, a party with a POP anywhere within that distance of the LEC central office could obtain expanded interconnection without installing any additional fiber optic facilities. Under the standard we adopt here, such parties would have to install fiber optic facilities to the connection point unless their facilities were actually located in the same building. While we are not requiring that interconnectors located in LEC central office buildings run fiber optic facilities out to the interconnection point and back into the building, they must compensate the LEC as if the LEC provided those facilities and interconnect exactly like other parties in all remaining respects. This greatly reduces potentially unfair advantages associated with having a POP located in the same building as a LEC central office. Accordingly, we see no reason to impose substantial restrictions on AT&T's use of expanded interconnection that do not apply to other parties.[172]

VI. STANDARDS FOR INTERCONNECTION ARRANGEMENTS

A. Overview

69. Notice. We proposed adopting specific rules and standards governing the terms and conditions of LECs' special access expanded interconnection offerings.[173]

70. Comments. Some LECs suggest that, in lieu of adopting detailed rules for expanded interconnection, the Commission should establish general interconnection goals or principles.[174] U S West suggests that as with ONA, the Commission should allow the LECs to file service offerings that comport with general interconnection principles.[175] GTE and several state commissions propose that the Commission develop broad guidelines, but defer to state commissions to implement expanded interconnection.[176] BellSouth suggests that the Commission encourage LECs to introduce expanded interconnection voluntarily by relaxing certain regulations for implementing LECs.[177]

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172 We will, however, monitor expanded interconnection to determine whether parties other than AT&T are taking advantage of expanded interconnection. See infra ¶ 263.

173 Notice, 6 FCC Rcd at 3262-64, ¶¶ 21 & 26.

174 USTA Comments at 14-16.

175 U S West Comments at 55-58.

176 GTE Comments at 1-11; Arkansas/Missouri Reply Comments at 4; California Comments at 9-10.

177 BellSouth Comments at 45-46; BellSouth Reply Comments at 17.

71. Other parties respond that the Commission should issue specific rules on interconnection standards and closely supervise the implementation process in order to avoid the delays and LEC market power exploitation that they assert have characterized proceedings such as ONA to date.[178]

72. Discussion. We believe that the adoption of certain standards will bring faster implementation of expanded interconnection by clarifying the rights and obligations of the LECs and interconnectors. This should greatly reduce the number of disputes arising during the implementation process. Adopting only general principles would leave the process of defining those general guidelines to future proceedings with the likelihood of substantial delay.

B. Space Allocation and Exhaustion

73. Notice. We invited comment on whether we should establish standards for space allocation among interconnecting parties in the event that there is insufficient space in a central office to accommodate all prospective interconnectors with physical collocation arrangements.[179]

74. Comments. Although the parties differ on whether exhaustion of central office space under a regime of physical collocation is likely, they agree for the most part that such space should be offered on a first-come, first-served basis.[180] At least one commenter suggests that carriers should be given priority over other interconnectors in space allocation decisions,[181] but that suggestion is strongly disputed by various users.[182] The SBA proposes that if there is a space shortage in a LEC central office, certified carriers should have priority over end users or ESPs.[183]

75. A number of the LECs generally argue that they should not have to construct new buildings and additions, or forgo their own planned use of central office space in order to accommodate interconnectors.[184] The Justice Department agrees, arguing that LECs would have an incentive to acquire

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178 Bankers Reply Comments at 21-22; McCaw Reply Comments at 16-17.

179 Notice, 6 FCC Rcd at 3264, ¶ 27.

180 See, e.g., United Comments at 3, 6-7; USTA Comments at 34-37; Cincinnati Bell Reply Comments at 23.

181 SBA Comments 23-24.

182 Bankers Reply Comments at 7-11.

183 SBA Comments at 23-24.

184 See, e.g., Bell Atlantic Comments at A-5; Cincinnati Bell Reply Comments at 23-24.

additional space voluntarily to meet demand if they can recover the market value of such space.[185]

76. A few LECs argue that they should be free to establish minimum and maximum floor space requirements under physical collocation.[186] The CAPs generally think this is reasonable, but ask that they be given the option to lease additional units of space or to reserve additional space for future use, subject to a reasonable deposit and anti-warehousing safeguards.[187] MFS proposes that the Commission limit LEC-imposed insurance requirements in connection with physical collocation arrangements to a maximum of $1 million.[188]

77. Discussion. In certain LEC central offices, space for physical collocation could become filled to capacity. In such circumstances, we conclude that, rather than being free to reject subsequent requests for expanded interconnection, LECs should be required to provide virtual collocation when space for physical collocation is exhausted. In addition, we conclude that LECs should be required to offer central office space on a first-come, first-served basis.[189]

78. Permitting LECs to turn away interconnectors when space for physical collocation is exhausted could prevent interested parties from collocating in offices where space is limited. Requiring LECs to provide a virtual collocation alternative will help ensure that all potential interconnectors can be accommodated, but should not prove to be onerous for the LECs. LECs claiming that space is exhausted in any particular central office may file petitions for exemption from the general requirement that LECs make

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185 Justice Reply Comments at 39-40.

186 United Comments at 3, 6-7; USTA Comments at 34; Cincinnati Bell Reply Comments at 22-23; Teleport Denver Comments 7-8; Locate Comments at 35; ICC Comments at 18-19.

187 Locate Comments at 34-35; MFS Comments at 47-51.

188 MFS Comments at 53.

189 In addition to space allocation issues, questions concerning appropriate security arrangements also can arise under physical collocation. Most commenters argue that appropriate security arrangements for physical collocation should be negotiated by the parties. We agree that specific security issues as well as appropriate insurance levels and other similar matters are best resolved through informal discussions among interested parties, with those resolutions reflected in LEC tariffs. We believe that other detailed terms and conditions for physical collocation should be similarly developed. We will require that any arrangements imposed by the LECs meet legitimate concerns, and we will reject tariff language containing terms that are unreasonably restrictive or expensive.

physical collocation available to interconnectors desiring it.[190] A LEC that is already offering interstate physical collocation in a given office must continue to do so during the pendency of such petitions.[191]

79. We find that requiring LECs to expand their facilities or relinquish space reserved for their future use, as suggested by some parties, is neither reasonable nor likely to serve the public interest. Such a requirement could interfere with the LECs' ability to serve existing ratepayers and might impose considerable and unnecessary expense on the LECs when a virtual collocation alternative can be implemented. We do, however, expect that LECs will consider interconnector demand for central office space when remodeling or building new central offices, just as they consider demand for other services when undertaking such projects.

80. Since we are requiring LECs to provide virtual collocation when space for physical collocation is exhausted, allocating space on a first-come, first-served basis appears to be more equitable than giving a preference to carriers, as all interconnectors would be able to obtain access to the central office through either physical or virtual collocation. We also permit LECs to include in their tariffs reasonable restrictions on warehousing of unused space by interconnectors.

C. Point of Interconnection

81. Notice. We proposed that interested parties be allowed to interconnect with the LEC for purposes of expanded interconnection anywhere within one-eighth mile (201 meters) of the LEC central office. We explained that this distance would represent the minimum use of LEC facilities for which a customer must pay when interconnecting under a virtual collocation arrangement.[192]

82. Comments. The one-eighth mile standard proposed in the Notice was criticized by LECs, CAPs, and users. A number of the LECs express concern that the proposal might require them to extend their fiber optic

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190 Absent exceptional circumstances, these petitions will be evaluated based on factual showings related to the issue of space availability.

191 We delegate authority to the Chief, Common Carrier Bureau, to consider and rule on such petitions. As central office space is exhausted, the LEC will, of course, have to cease offering physical collocation to new interconnectors, and begin using virtual collocation to accommodate these parties at a point when enough central office space is still available to accommodate all anticipated expanded interconnection customers through virtual collocation. Once a LEC provides physical collocation in a particular central office, however, we would not permit it to withdraw this offering for existing customers due to space limitations, absent extraordinary circumstances.

192 Notice, 6 FCC Rcd at 3262-63, ¶ 22.

facilities to a potentially unlimited number of locations within that radius,[193] and that, in large metropolitan areas, hundreds of business customers would be potential interconnectors simply by virtue of their location.[194] While some LECs agree with the Commission's proposal that interconnection be allowed anywhere within one-eighth of a mile of the central office, others argue that each LEC should be permitted to (or that the Commission should) designate a finite number of interconnection points within that radius, rather than allowing the customer to choose the location to which the LEC would have to bring its fiber optic facilities.[195]

83. CAPs argue that the one-eighth mile standard fails to acknowledge that, in the case of virtual collocation, as opposed to traditional special access, an interconnector would be entering into an arrangement expressly designed to avoid purchasing LEC transmission services.[196] In addition, the one-eighth mile standard was widely misconstrued by potential interconnectors. For example, some of the CAPs and users believe the one-eighth mile rule would require an interconnecting party to establish a node or "mini-POP" in a nearby building at which the interconnection would occur.[197] Teleport suggests that the operational demarcation point be placed inside the central office in order to clarify that such nodes are not necessary.[198] It also proposes placing the ownership demarcation point for virtual collocation in a public right-of-way that is accessible to all potential interconnectors and is as close to the central office as possible.[199] GSA is the only user that specifically asserts that the proposed one-eighth mile interconnection zone is reasonable.[200]

84. Discussion. We conclude that we should require LECs to specify an interconnection point or points as close as reasonably possible to

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193 See, e.g., Bell Atlantic Comments at A-9; GTE Comments at 29; United Comments at 7-8; USTA Comments at 17; Ameritech Reply Comments at 30-31. The non-dominant IXCs also criticize the one-eighth mile rule as inherently arbitrary. See, e.g., MCI Comments at 18; Allnet Comments at 2-3.

194 See, e.g., NYNEX Comments at 17.

195 See, e.g., Bell Atlantic Comments at A-9; Pacific Comments at 73-74; BellSouth Comments at 59; GTE Comments at 29-30; United Comments at 4, 7-8; USTA Comments at 17-18; Ameritech Reply Comments at 30-31.

196 See, e.g., MFS Comments at 38-39.

197 See, e.g., McCaw Reply Comments at 11-14.

198 Teleport Comments at 22. The "operational demarcation" point would define the point at which interconnector operational control of the circuit ceases and LEC operational control begins.

199 Id.; ALTS Comments at 21.

200 GSA Comments at 8.

the central office.[201] In order to ensure that all parties are treated fairly, these interconnection points must be physically accessible by both the LEC and interconnectors on non-discriminatory terms.

85. The proposed one-eighth mile standard was intended to make clear which parties would qualify for expanded interconnection and the minimum use of LEC transmission facilities for which such parties must pay. It was not intended to require interconnectors to establish "mini-POPs" in nearby buildings and stock them with redundant electronics, as some parties feared. Rather, the one-eighth mile standard was intended to avoid a requirement that interconnectors, particularly end users, build their facilities to the LEC location. The record convinces us, however, that adoption of this standard would not serve the public interest. Use of the one-eighth mile standard could impede the development of robust competition because CAPs would be effectively foreclosed from competing for customers within that radius.[202] Requiring the LEC to designate an interconnection point or points close to the central office largely eliminates the one-eighth mile no-competition zone. Moreover, it alleviates LEC concerns that many large business customers located near central offices could switch from special access to expanded interconnection services due to their fortuitous location, or that the LECs could be forced to extend their fiber optic facilities to additional locations. In addition, the record does not indicate that this standard would impede interested customers from taking advantage of expanded interconnection[203] or that LEC designation of interconnection points would create a potentially anticompetitive situation.

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[201] Under virtual collocation, the interconnection point would constitute the demarcation between interconnector and LEC ownership of facilities. Under physical collocation, the interconnection point would not indicate a change in ownership of cable facilities, although the interconnector-owned fiber optic cabling would enter the LEC facilities through the same route. In the case of physical collocation, the interconnector would retain ownership of the cable, but would pay space rental for use of LEC conduit and other facilities starting at or very near the interconnection point.

[202] In the Notice we recognized that the LEC transmission facilities covered by the connection charge would constitute a zone within which interconnecting parties could not compete with LEC facilities because the LEC connection charge alone would always be less than the sum of the LEC connection charge and CAP charges.

[203] Although the one-eighth mile standard would permit more end users to qualify for expanded interconnection without an upfront investment in fiber optic cabling to the LEC central office, the majority of users participating in this proceeding do not comment on the issue. Those that do mention the standard generally argue that it would disadvantage users. For example, the American Petroleum Institute argues that the standard would undermine the objective of route diversity because it is likely that the LEC and CAP transport facilities would be "single threaded" the last eighth mile to the end office. API Comments at 15.

D. **Points of Entry into Central Offices**

86. Notice. The Commission sought comment on the need for specific rules governing the terms and conditions for expanded interconnection, although we did not specifically discuss this issue.[204]

87. Comments. Some CAPs and users argue that, in order to ensure route diversity and circuit redundancy, the Commission should require the LECs to offer interconnectors multiple entry locations to LEC central offices.[205] MFS contends that LECs should have to make available, upon request, at least two entry points along different major feeder cable routes. It states that the interconnector should bear the expense of constructing its own facilities to both points.[206]

88. NYNEX and United respond that a single point of entry should be sufficient. United asserts that in many instances it has only one point for cable entry into its central offices, and that the new cable, conduit, manhole, and building construction that would be necessary to provide two entry locations would be wasteful and unreasonable.[207] NYNEX argues that multiple entrance facilities may not be possible in some offices because of space availability and engineering concerns and, thus contends that this issue should be left to negotiations between LECs and interconnectors.[208] USTA adds that interconnecting parties should bear the responsibility of seeking alternative interconnection points at their own expense.[209]

89. Discussion. We conclude that LECs should be required to provide at least two separate points of entry to a central office whenever there are at least two entry points for LEC cable.[210] Providing diverse entry points into the central office ensures that interconnectors can obtain redundancy. This is important to many CAPs because their customers want increased reliability. While some of the LECs state that there are central offices where more than one point of entry is not possible, this does not appear to be a major problem. We also emphasize that a LEC would have to

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204 Notice, 6 FCC Rcd at 3263-3264, ¶¶ 25-29.

205 See, e.g., Bankers Comments at 19; IDCMA Comments at 16-17. See also Teleport Denver Comments at 6.

206 MFS Comments at 60.

207 United Comments at 7-8.

208 NYNEX Reply Comments at Exh. 17.

209 USTA Comments at 18.

210 The LEC need not offer more than two points of entry for interconnectors even if it has additional entry points for its own facilities.

offer two points of entry to a particular central office only if it has at least two entry points for its own cable.

E. Equipment Placed in Central Offices by or for Interconnectors

90. Notice. We stated that "the provision of fiber optic transmission links by interconnecting parties requires that equipment, such as multiplexers, be placed in the LEC central office for use by the interconnecting party."[211] The Notice also distinguished this proceeding from Computer III,[212] noting that in the latter case enhanced service providers (ESPs) sought collocation of their computers largely in order to avoid transmission costs, while here, electronic equipment is essential to the transmission services being competitively provided under expanded interconnection, and determines the availability of essential monitoring and control and associated capabilities. Accordingly, we stated that our proposal for special access expanded interconnection does not require or warrant a reevaluation of our decision not to mandate collocation for different purposes in Computer III."[213]

91. Comments. Several user groups contend that the Commission should, in effect, overrule Computer III and require LECs to place in their central offices competitors' enhanced service equipment, as well as switches and data over voice (DOV) equipment.[214] For example, Ad Hoc asserts that there should be no restrictions on the type of equipment interconnectors can place in the LEC central office, and submits that any arbitrary distinction would likely run afoul of the Section 202(a) prohibition against discrimination. Instead, it proposes that LECs solve any space availability problems by imposing limitations on the amount of space an individual inter-

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211 Notice, 6 FCC Rcd at 3261, ¶ 18, n.17.

212 Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (Phase I Order), recon., 2 FCC Rcd 3035 (1987) (Phase I Reconsideration Order), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989), Phase I Order and Phase I Reconsideration Order vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990), pet. for rev. pending sub nom. Illinois Bell Tel. Co. v. FCC, No. 88-1364 (D.C. Cir. filed May 16, 1988); Phase II, 2 FCC Rcd 3072 (1987), recon., 3 FCC Rcd 1150 (1988), further recon., 4 FCC Rcd 5927 (1989), vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991), pets. for recon. pending, pets. for rev. pending sub nom., California v. FCC, No. 92-70083 (9th Cir. filed Feb 14, 1992), California v. FCC, No. 92-70105 (9th Cir. filed Feb. 21, 1992).

213 Notice, 6 FCC Rcd at 3261, ¶ 18, n.17.

214 See, e.g., Ad Hoc Reply Comments at 22-24; IDCMA Comments at 13-15; Bankers Reply Comments at 11. See also CompuServe Comments at 7-8.

connector can occupy.[215] IDCMA also argues that customers should be allowed to select and provide central office equipment for interconnection with LEC-provided transmission facilities.[216]

92. Several LECs, on the other hand, contend that the Commission should reject these proposals. For instance, NYNEX argues that expanded interconnection is intended to permit third parties to compete with the LECs for transport, and that the use of central office space by interconnectors should be limited to equipment required to provide competitive transmission. It submits that all other equipment could be located outside the central office without imposing a technical or economic handicap on interconnectors.[217] Bell Atlantic adds that there is no reason to reopen the issue of collocation for ESPs, as both LEC-affiliated and other ESPs pay the same rates for all basic services under ONA parity pricing rules.[218] In addition, Bell Atlantic argues that since protocol conversion is an enhanced service, LECs should have no obligation to provide virtual collocation for such equipment.[219] United lists optical line terminating multiplexers, subtending DS3/SONET and DS1 multiplexers, and digital cross-connect systems as the only types of equipment that LECs should be prepared to house in their central offices under expanded interconnection.[220]

93. Discussion. This proceeding is intended to remove barriers to competition in the provision of basic transmission services between LEC central offices and third-party premises. We conclude that the expanded interconnection requirements should apply only to central office equipment needed to terminate basic transmission facilities, including optical terminating equipment and multiplexers -- the equipment necessary to foster competition for basic interstate access services. We do not here require the LECs to allow interconnectors to place in the central office or to designate for placement in the central office other types of equipment (such as enhanced services or customer premises equipment), under either physical or virtual collocation arrangements, since collocation of such equipment is unrelated to the competitive provision of basic transmission services.[221] In

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215 Ad Hoc Comments at 22-24.

216 IDCMA Comments at 14, 21-22; IDCMA Reply Comments at 9-11.

217 NYNEX Comments at 14-15. The users oppose NYNEX's proposed restriction. See, e.g., Ad Hoc Reply Comments at 22-24; IDCMA Reply Comments at 5-9; Bankers Reply Comments at 11.

218 Bell Atlantic Comments at A-2.

219 Id. at A-3.

220 United Comments at 3.

221 We thus tailor the scope of our collocation requirement to what is necessary to achieve the specific public policy objective of this proceeding -- the removal of regulatory barriers to development of basic

addition, as we observed in the Notice, central office collocation of ESP equipment is not essential to ensuring fair competition in the provision of enhanced services. In Computer III, the Commission found and repeatedly reaffirmed that physical collocation of enhanced services equipment within LEC central offices was not necessary to achieve technical comparability between ESP and LEC services. No party here has presented any persuasive evidence to the contrary.[222]

94. In addition, changing our Computer III rule could have significant drawbacks for the workings of expanded interconnection under both virtual collocation and physical collocation. Allowing physical collocation of ESP equipment could easily result in space problems given the relatively large number of ESPs.[223] Under virtual collocation, allowing collocation of ESP equipment could require a LEC to install, maintain, and repair a great variety of equipment unfamiliar to its technicians. The burdens associated with installation, maintenance, and repair of interconnector-designated transmission equipment should not be unreasonable or overly burdensome for the LECs. Given the much greater variety of ESP equipment, expanding this requirement to include such equipment would cause significantly greater burdens, however. As a result, we decline to modify Computer III to require the LECs to permit collocation of ESP equipment.[224] Questions regarding switch collocation on LEC premises and collocation of equipment to be used with LEC transmission facilities are considered in the Second Notice of Proposed Rulemaking in this proceeding.[225]

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interstate access service competition. In the Second Notice of Proposed Rulemaking in this proceeding, we ask for comment on an IDCMA proposal that is beyond the scope of the initial Notice: that third parties be allowed to use space in LEC central offices for the collocation of equipment to be interconnected with LEC-provided transmission facilities. See Second Notice at ¶ 49.

222 See Computer III, 104 FCC 2d at 1037-38. See also supra note 93.

223 For this reason, we decline to require collocation of ESP equipment even when the party is already physically collocated for transmission purposes, even though permitting ESP equipment collocation under such circumstances might allow interconnectors to make more efficient use of their central office space. We reach this conclusion because we are concerned that allowing interconnectors to put ESP equipment in the limited space dedicated to their use would accelerate the point at which they would need to seek additional space. This would hasten the exhaustion of space for physical collocation of transmission facilities.

224 Accordingly, we will not require the LECs to permit collocation of protocol conversion equipment. See Computer III, 104 FCC 2d at 1037-38. We will, however, require the LECs to permit central office collocation of data-over-voice (DOV) equipment, used to provide a basic transmission service under both physical and virtual collocation.

225 Second Notice at ¶¶ 47-49.

F. Interconnection of Non-Fiber Technologies

95. Notice. The Notice asked parties to address the use of our proposed standards to govern expanded interconnection of transmission systems using non-fiber optic technology.[226]

96. Comments. Most LECs oppose mandatory interconnection for non-fiber optic transmission systems. They argue that fiber technology is more reliable, thereby minimizing the need for interconnector access to the central office to maintain equipment under physical collocation. In addition, these LECs assert that fiber optic facilities would make the most efficient use of possibly limited telephone company cable vault and riser space. Many LECs also list a number of potential problems with mandating interconnection for microwave services, such as roof space availability, central office buildings with slanting roofs that cannot support antennas, equipment compatibility, security, implementation complications, and neighborhood opposition.[227] NYNEX, on the contrary, believes that space on central office roofs should be made available for collocation by microwave carriers, subject to reasonable limits (i.e., a maximum of four antennas per interconnector, and a prohibition on warehousing of unused space).[228]

97. A number of CAPs and users argue that the Commission should require that LECs make expanded interconnection available via rooftop antennas to interconnectors employing microwave facilities.[229] Locate asserts that the Commission should not underestimate the important role played by microwave carriers, and argues that if CAP microwave facilities were collocated in LEC central office buildings, users would have a facilities-diverse alternative transmission path available in the event of a LEC service outage. Locate also argues that there are no technical impediments to the collocation of microwave facilities and contends that microwave interconnection requests should be treated identically to fiber interconnection requests.[230] Ad Hoc also suggests permitting expanded interconnection for non-fiber cable.[231]

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226 Notice, 6 FCC Rcd at 3264, ¶ 29.

227 See, e.g., Ameritech Reply Comments at 34-37; Bell Atlantic Reply Comments at 16-17; BellSouth Reply Comments at 23-24; GTE Reply Comments at 75-76.

228 NYNEX Reply Comments at Exh. 14.

229 See, e.g., Locate Comments at 7; ALTS Comments at 26; McCaw Comments at 11-14; Ad Hoc Comments at 27; API Comments at 21; Teleport Denver Comments at 7.

230 Locate Comments at 7-13.

231 Ad Hoc Comments at 27; Ad Hoc Reply Comments at 22-23.

98. Discussion. We here require expanded interconnection of both fiber optic systems and, where reasonably feasible, microwave transmission facilities. There are both CAPs and users who express interest in using expanded interconnection in conjunction with microwave technology.[232] Permitting microwave interconnection will expand choices generally for customers. In addition, interconnection of microwave systems could provide needed alternate routing in the event of certain types of LEC network outages. It is clear that restricting mandatory collocation to fiber optic systems would be simpler to implement than an approach permitting multiple technologies to interconnect. Microwave interconnection would require resolution of additional issues involving rooftop space availability and suitability for microwave antennas, as well as authorizations required under any other applicable rules or laws. Nevertheless, we find that such a restriction would unnecessarily limit interconnection, with an adverse effect on competition generally. The interconnection architecture and other related standards, as well as the tariffing, rate structure, and pricing rules adopted in this Order, will generally apply to microwave interconnection, except to the extent that differences in the interconnection technology warrant a different result.

99. At least one party supported interconnection of non-fiber optic cable facilities (e.g., copper coaxial cable) provided by third parties. A number of the LECs, however, have argued that such a requirement is undesirable because it would make limited conduit and riser space available to technologies that are much less space efficient than fiber. Given the potential adverse effects of such interconnection on the availability of conduit and riser space, we believe that interconnection of non-fiber optic cable should be permitted only upon Commission approval of a showing that such interconnection would serve the public interest in a particular case.[233]

G. LEC Offices at Which Interconnection is Available

100. Notice. In the Notice, we referred to interconnection at LEC central offices, contemplating interconnection at both end offices and serving wire centers.

101. Comments. Various users and CAPs argue that interconnectors should be able to connect to the LEC network at as many points as possible, including end offices, serving wire centers, tandem offices and remote

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232 Locate, Bay Area Teleport, and Associated Communications-Los Angeles are CAPs with primarily microwave-based systems. Certain large users also employ radio-based technology for private line services.

233 We delegate authority to the Chief, Common Carrier Bureau to act on any such requests. This requirement would not apply to non-fiber optic cable used for the interconnection of microwave antennas located on the roof of the LEC central office building.

distribution nodes.[234] They assert that this would enable them to achieve economies of scale, access the full array of LEC services, and obtain a greater degree of route diversity and network redundancy.[235]

102. The LECs urge the Commission to reject proposals that they be required to provide expanded interconnection at locations other than end offices or serving wire centers. They argue that such an approach would interfere with their ability to design and maintain efficient networks.[236] Ameritech points out that there are more than one thousand remote nodes in its operating territory, and argues that an obligation to provide non-discriminatory interconnection at all of these locations would exponentially increase the LECs' burden of administering expanded interconnection.[237] In addition, the LECs contend that the proposal might necessitate radical access charge restructuring, potentially forcing the LECs to establish separate rates for each discrete part of their networks based on disaggregated deaveraged costs.[238]

103. Discussion. We believe that LECs should be required to provide expanded interconnection at serving wire centers (SWCs) and end offices.[239] These offices are designed to provide aggregated access to end user premises and IXC POPs, to house a variety of equipment, and connect many different types of equipment and facilities. We also will require LECs to provide expanded interconnection at remote distribution nodes, and any other points, that the LEC treats as a rating point -- a point used in calculating the length of interoffice special access links.[240] We believe that interconnection at these points is necessary to foster competition with the existing LEC service offerings. Expanded interconnection at tandem

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234 See, e.g., ALTS Comments at 16; Teleport Denver Comments at 6; IDCMA Comments at 16-17; Intermedia Reply Comments at 1.

235 See, e.g., Bankers Comments at 19; IDCMA Comments at 16-17.

236 See, e.g., Ameritech Reply Comments at 31-32; BellSouth Reply Comments at 18-19; Pacific Reply Comments at 68-72; Cincinnati Bell Reply Comments at 21-22.

237 Ameritech Reply Comments at 32.

238 See, e.g., Cincinnati Bell Reply Comments at 21-22; BellSouth Reply Comments at 19; Pacific Reply Comments at 71-77.

239 Most SWCs also serve as end offices.

240 If interconnection at such a remote node is technically or practically infeasible, for example, because of space constraints, the LEC can apply for an exemption from or a waiver of this requirement.

switches is not an issue with regard to special access interconnection.[241] The question of interconnection with tandem switches, however, must be resolved when the Commission considers switched transport interconnection.[242]

104. While requiring LECs to provide expanded interconnection at other remote nodes or locations would increase interconnector options, it would substantially increase the burden of expanded interconnection on LECs.[243] An obligation to interconnect at all such locations has the potential to complicate significantly LEC network planning.[244] These remote nodes also tend to be very small (some are merely underground or pole mounted splice cases or metal boxes) and interconnection at many of these points would not be feasible due to space limitations and other administrative concerns.[245]

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241 LEC expanded interconnection obligations extend to central office buildings that house end offices or SWCs as well as tandem switches, but not to buildings that contain only tandem switches and are not used as a rating point for special access.

242 See Second Notice at ¶ 20.

243 For example, the LECs would have to provide for maintenance of or interconnector access to equipment at locations not regularly visited by LEC personnel, as well as security for both LEC and interconnector equipment.

244 Remote nodes and other similar locations are not generally used to house a range of equipment. Instead, they typically house only equipment necessary for specific functions such as repeater. Long term network planning could be complicated considerably if LECs had to anticipate use of such locations for broader purposes.

We also note that expanded interconnection at such remote nodes appears to be of little competitive value absent a degree of LEC special access unbundling that is beyond the scope of this proceeding. LEC rate structures do not allow customers to originate or terminate special access service at these subsidiary nodes. An interconnector will have difficulty attracting customers for a portion of a special access link if the LEC rate structure is not unbundled to allow the customer to purchase the remainder of the special access link from the LEC.

245 The Commission's customer proprietary network information (CPNI) rules, see Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7605-14 (1991), prohibit the BOCs and AT&T, in certain circumstances, from using customer information obtained in the course of providing basic services to market their enhanced services and CPE. Locate and MCI argue that similar rules should be applied to information about CAP customers that LECs obtain in the course of providing expanded interconnection. See Locate Comments at 30; MCI Reply Comments at 64-65. We disagree. The provision of expanded interconnection and the LECs' competing special access services are basic services. Information about expanded interconnection customers is likely to

H. Ratcheting of Switched and Special Access Services

105. Notice. While the Notice proposed expanded interconnection only for the provision of special access services, we did not specifically discuss the question of whether interconnectors or their customers could engage in ratcheting, carrying switched access traffic over interconnected special access circuits while paying the full switched transport access charge to the LEC.[246]

106. Comments. Certain LECs ask that the Commission explicitly prohibit special access interconnectors from "ratcheting" and using any excess special access capacity to provide switched transport service through the same collocated facilities. The LECs argue that ratcheting increases the cross-elasticity between special and switched access and should be prohibited in order to minimize customer circumvention of the Commission's attempt to distinguish between the two services for purposes of expanded interconnection.[247] Several LECs point out that under the Execunet case,[248] interconnectors could be entitled to demand connection of switched traffic to their collocated facilities unless the Commission makes a specific public

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be available to the LECs' special access sales force through means other than a CAP expanded interconnection order, obviating the competitive and privacy concerns underlying our CPNI rules. For example, except when seeking redundancy, a customer ordering service from a CAP will usually discontinue circuits provided by the LEC or reduce its orders for additional LEC circuits. These actions alone will no doubt generate a competitive response from the LEC sales staff. In addition, compared with the separation between the sales staffs for basic services and for CPE or enhanced services, it would be more burdensome for LECs to separate personnel who market expanded interconnection from those who market other access services.

246 The LECs permit ratcheting by special access customers, with customers ordering high capacity special access service, such as DS1, and carrying switched transport traffic over a portion of the circuits. The customer pays the full switched transport access charge, and receives a reduction in its special access charges proportional to the number of circuits used for switched transport. Thus, ratcheting over LEC facilities does not allow customers to avoid switched transport charges, but it does permit customers to use high capacity special access service with the resulting lower per circuit cost to the customer when this would not be economical based on special access traffic alone. See infra note 461.

247 See, e.g., Bell Atlantic Comments at A-15; Pacific Comments at 15, 63-67; Pacific Reply Comments at 17-18; Ameritech Comments at 35, 58; USTA Comments at 43-44.

248 MCI Telecommunications Corp. v. FCC, 561 F.2d 365, 377 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978).

interest finding that such connection would not be in the public interest.[249] BellSouth suggests, however, that the Commission permit ratcheting of switched services subject to existing bundled switched access rates, plus a transitional switched access connection subelement to apply to interconnectors.[250]

107. MFS argues that the Commission need not prohibit interconnectors from entering the switched market pending completion of the switched access expanded interconnection proceeding because there is no way an interconnector could obtain access to switched traffic without paying LEC transport charges. Therefore, according to MFS, CAPs would have no incentive to purchase switched services and resell them to an IXC. Even if interconnectors did so, MFS argues that the LECs would continue to recover the same amount of revenue.[251] MFS contends that if the Commission chooses to restrict CAP ratcheting or carriage of switched traffic, it must place the same restrictions on the LECs in order to prevent unfair competition.[252]

108. Discussion. In the initial Notice, we stated our intention to go forward with expanded interconnection for special access service while studying the desirability of such arrangements for switched transport further before deciding whether to proceed. This decision was based on our conclusion that competition for the provision of switched transport raised questions concerning separations and transport rates, potentially affecting residential customers, that do not exist in the special access context. Additionally, the Commission recognized the significant competitive implications of allowing interconnectors to compete by offering flat-rated transport service while the LECs were required to charge on a per-minute basis.

109. Given the potential effect of CAP ratcheting on the market for switched transport, we do not believe at this time that interconnectors should be allowed to ratchet at a date significantly before the LECs have implemented a new transport rate structure. If interconnectors were allowed to ratchet, their customers could treat the interconnector facilities in the central office as a POP and thus qualify for switched transport service at

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249 BellSouth Comments at 16-18; BellSouth Reply Comments at 33 n.66; Rochester Comments at 30-32.

250 BellSouth Comments at 20-21.

251 MFS Reply Comments at 25. MFS concedes that the CAP customer would be able to avoid distance-sensitive switched transport charges. It points out that switched access customers could achieve the same result by locating a "closet POP" within the lowest rate band, however, and argues that the LECs could eliminate the incentive for customers to do this by reducing their transport mileage charges. Id. at 25 n.20.

252 Id. at 23-26. According to Pacific, only about 0.47 % of Pacific Bell's special access traffic is provided pursuant to "ratcheting" or shared use tariff provisions. Pacific Reply Comments at 12 n.19.

the initial lowest price rate band in the LEC transport tariff. These rates are distance sensitive and priced on a per minute basis. Thus, interconnectors would be substituting their facilities for those of the LEC in transporting the call to an IXC POP, presumably applying flat-rated pricing for the service as is done for special access. To the extent that LEC costs are recovered through distance sensitive rates, ratcheting effectively forces the LEC per minute charge to compete against the CAPs' flat rate charges, and forces the LEC to face the potential of losing significant amounts of revenue before transport rate restructuring occurs. In light of the benefits that customers realize through ratcheting, we do not believe that barring LEC ratcheting as advocated by MFS is in the public interest.

VII. PRICING AND RATE STRUCTURE

A. Overview

110. In this section of the Order, we address the pricing and rate structure issues associated with special access expanded interconnection. There are four major issues that must be resolved. First, we must consider the rate structure and level of the connection charges that interconnectors will pay LECs to cover the costs of virtual and physical collocation. Second, we must decide whether the LECs will be permitted to charge interconnectors a contribution element over and above the connection charges, and if so, how they are to calculate the amount of such an element. We must also answer a number of questions related to the tariffing of connection charge subelements. Finally, we must determine the extent to which the LECs will be permitted flexibility in setting their own special access rates in the face of increased competition.

111. The comments generally reveal two alternative models for resolving the special access expanded interconnection pricing and rate structure issues. The LECs advocate an approach involving minimal regulatory constraints on them. The CAPs support a very different approach that is much more advantageous to interconnectors.

112. The LECs argue that they should be allowed a substantial degree of freedom to determine prices and rate structures for the connection charges, contribution element, and their own special access services. The likely result would be relatively high connection charges, contribution element, or both. Their approach would also give the LECs broad flexibility to adjust the rates for their own services in response to competition.

113. According to the CAPs and certain other parties, the Commission should adopt regulatory ground rules that would actively promote competitive entry and market penetration by the CAPs. Under the CAP approach, the LECs would be required to establish relatively low connection charges and would not be allowed to impose a contribution charge. At the same time, the LECs' flexibility to price their own special access services would be very limited until competition has developed further.

114. The pricing measures we adopt represent an approach that draws from both these alternatives. Our pricing rules are also carefully designed to ensure that regulation does not artificially distort the development of competition, undermining customer benefits. For example, non-cost-based restrictions on LEC responses to competition would create a pricing umbrella for the CAPs, potentially fostering uneconomic investment, and depriving customers of the benefits of LEC rate reductions. At the same time, excessive LEC connection or contribution charges would hinder the development of competition, depriving customers of the associated efficiency gains.

115. Under our approach, the LECs will be allowed to recover through the connection charges a reasonable share of overheads, as is the case with the prices for other communications services. Although no contribution charge will be permitted at this time, the LECs may file requests seeking Commission approval of a limited contribution charge targeted to recover specifically identified subsidies or non-cost-based allocations that they demonstrate are embedded in the rates for LEC special access services subject to competition. In addition, the LECs will be given some additional pricing flexibility to respond to competition. This pricing structure for expanded interconnection for special access is designed to foster economic efficiency by ensuring that affected parties' decisions regarding market entry and pricing reflect appropriate costs.[253]

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253 Over the past two decades, the Commission has removed regulatory barriers to entry, thereby fostering the development of competition in various markets, including the interexchange market. While interexchange competition has developed relatively slowly, there are significant differences between the conditions prevailing while interexchange competition was developing and those that exist in the special access and switched transport markets today. Taken together, these differences indicate that special access and switched transport competition could develop much more rapidly than interexchange competition did.

First, once CAPs are interconnected to the central offices that handle heavy traffic, they can gain a significant share of the access market by selling their services to the three largest IXCs. In contrast to this, the new IXCs (other common carriers, or OCCs) had to market their interexchange services to thousands of individual customers to capture the market shares they now hold. Second, unequal access hindered the development of interexchange competition for many years, undermining marketplace acceptance of OCC services. By contrast, the interconnection received by the CAPs, under either virtual or physical collocation, would be technically comparable to that used by the LECs. Finally, it is not clear that access traffic will grow rapidly enough to offset LEC traffic losses to the new entrants. In the case of interexchange competition, the growth of interstate toll traffic was stimulated substantially by the access charge reductions accompanying implementation of SLCs and separations changes.

B. Connection Charges

1. Rate Structure

116. Notice. We tentatively concluded that the Commission should adopt new rate structure requirements in order to accommodate expanded interconnection. Accordingly, we sought comment on two rate structure options for virtual collocation.[254] Under one alternative, new connection charges would be designed for interconnectors, who would also pay for special central office features such as specially designated electronic equipment dedicated to their use. LEC special access customers would continue to pay existing channel termination rates. Under the other alternative, the current channel termination charge would be unbundled into two separate charges: a transmission charge paid only by LEC special access customers, and a connection charge paid by both LEC special access customers and interconnectors. The connection charge would recover the LECs' cost of transmission from the central office to the interconnection point, as well as the use of central office features. We also invited comment on the application of these alternative rate structures to physical collocation, noting that different costs would be included in an unbundled connection charge for physical collocation because interconnector use of LEC facilities differs under physical and virtual collocation.[255]

117. Comments. The parties are divided in their support for the two options. Some suggest variations on the two alternatives proposed by the Commission. Ameritech, SW Bell, Teleport, MFS, ICC, MCI, CompTel, Ad Hoc, and ICA favor creating new connection charges.[256] They say that the unbundling alternative would be burdensome, confusing and disruptive to the majority of special access customers and would benefit only a few parties. MFS asserts that the unbundling alternative is unworkable and unnecessary, and that it would be difficult to create pricing parity between physical and virtual collocation under the unbundling option. Several CAPs also argue that the unbundling approach would treat them as customers rather than co-carriers.[257] Teleport contends that the charges for interconnection facilities should not be dependent on the amount of CAP traffic provided over the facility.[258] Some CAPs and users state that the unbundling option would

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254 Notice, 6 FCC Rcd at 3265, ¶¶ 37-40.

255 Id., ¶ 41.

256 Ameritech Comments at 59-61; Ameritech Reply Comments at 45; SW Bell Comments, App. C at 1-3; Teleport Comments at 16-19; MFS Comments at 79-82; ICC Comments at 14; ICA Comments at 10-13; MCI Comments at 22-25; CompTel Comments at 18-19; Ad Hoc Comments at 28-29.

257 Teleport Comments at 12; MFS Comments at 80-81; FMR Comments at 12-13.

258 Teleport Comments at 15, 17.

not be appropriate for physical collocation.[259] The CAPs generally emphasize that the rate structure chosen should ensure that the connections LECs provide to interconnectors are economically comparable to those they provide for themselves.[260]

118. Supporters of the unbundling proposal include NYNEX, Centel, SNET, AT&T, the Bankers, GSA, SBA, and Justice.[261] These parties argue that unbundling would facilitate competition between LECs and CAPs for the transmission element, since LEC special access customers and CAPs would pay the same connection element. AT&T and Justice both argue that the unbundled alternative would help eliminate the inefficiencies and cross-subsidies built into the current rate structure, facilitate cost-based pricing of each element, prevent discrimination, and be consistent with the recent unbundling of ONA elements.[262] Some of the smaller CAPs and a number of state commissions also support the unbundling option.[263] NTIA supports allowing the LECs to experiment with either rate structure, although it favors unbundling.[264]

119. USTA, GTE, and Rochester argue that the Commission should not impose a specific rate structure and urge the Commission to let the LECs determine which rate structure to implement.[265]

120. Discussion. Expanded interconnection will benefit customers by allowing them to buy only the LEC central office connections that they need and to purchase other services (such as transmission) from third parties or provide these services themselves. Accordingly, either proposed rate

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259 Teleport Comments at 17 (unbundling existing special access rates would not work for physical collocation because connection charges should not be dependent on the amount of CAP traffic provided over interconnected facilities); Bankers Comments at 16-17 (unbundling option would not reflect LEC cost savings associated with not providing equipment under physical collocation).

260 See, e.g., Teleport Comments at 8.

261 NYNEX Comments at 24-25; Centel Comments at 7-8; SNET Comments at 17-18 (but favoring new connection charges if expanded interconnection rights limited to CAPs); AT&T Comments at 8-11; Bankers Comments at 15-16 (supporting unbundling for virtual collocation only); GSA Comments at 13-15; SBA Comments at 26-28; Justice Reply Comments at 45-49.

262 AT&T Comments at 9-10; Justice Reply Comments at 46-48.

263 See, e.g., Teleport Denver Comments at 10; Florida Comments at 11; Illinois Comments at 11; Michigan Comments at 8; D.C. Comments at 2.

264 NTIA Reply Comments at 16.

265 USTA Comments at 47; USTA Reply Comments at 31-34; GTE Comments at 37-39; Rochester Reply Comments at 15.

structure for expanded interconnection would effectively unbundle LEC transmission facilities from LEC central office connections. Formally dividing the special access rate structure into separate transmission and connection charges, as proposed in the Notice, however, would not be appropriate for most service elements covered by connection charges, because the services provided to interconnectors will not entirely parallel the services provided to LEC special access customers.[266] Formal unbundling is also inconsistent with our decision to permit individually negotiated tariff provisions for certain elements of the connection charges.[267] Accordingly, we will require that the LECs implement expanded interconnection by creating new connection charge elements for services they provide to interconnectors, rather than through formal unbundling of the special access rate structure into separate transmission and connection charges.[268]

121. The LECs' connection charges will cover a number of different functions and equipment. Thus, the LECs should tariff a number of different connection charge subelements. We conclude that, at least initially, we should not impose a detailed rate structure on the LECs. Rather, we will allow the LECs to establish reasonable disaggregated subelements for the connection charges, except that we will require the LECs to establish a cross-connect element that applies uniformly to both physical and virtual collocation.[269] This flexibility will enable them to tailor their connection charge rate structures to reflect their physical collocation offering, or any virtual collocation arrangements they negotiate with interconnectors. It will also permit the LECs to make their interstate connection charge rate structure consistent with their intrastate expanded interconnection rate structures. At least during the initial implementation

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266 For example, under physical collocation, interconnectors will rent floor space in LEC offices.

267 See infra ¶ 159.

268 We will not require unbundling of the cross-connect element from existing LEC special access rates, even though the cross-connect service that LECs provide to interconnectors and to LEC special access customers is identical, because the apparently small magnitude of this charge does not justify the administrative burdens of such unbundling. For example, New York Telephone's intrastate cross-connect charge is $3.51 per month for a DS1. We will, however, require unbundling of any contribution charge that may be imposed in the future from existing special access channel termination rates, with the contribution charge applying to both LEC special access customers and interconnectors. We believe that unbundling any contribution charge is necessary to facilitate even-handed application of such a charge to both interconnectors and LEC special access customers. See infra ¶¶ 143-49.

269 We conclude, however, that the magnitude of connection charges should not be based on the number or type of interconnected circuits a subscriber has, unless the cost of providing service depends upon the number or type of interconnected circuits.

period, we believe that the benefits of this flexibility outweigh the drawbacks of a non-uniform connection charge rate structure.

2. Initial Rate Levels of Connection Charges

122. Notice. We stated that in a price cap environment, review of initial rates based on costs may remain appropriate when, as in expanded interconnection, we make fundamental changes in the access charge structure to remove barriers to competition. We tentatively concluded that the initial rates for the new service elements to be paid by interconnecting parties should be reviewed not only under the price cap rules, but also pursuant to additional standards. In particular, we tentatively concluded that the price cap LECs should be required to justify their initial rates for connection charges and special central office services, to describe how they determined the direct costs of providing such services, and to explain the overhead loadings used in rate development. We stated that the same level of scrutiny should apply to both new and restructured services. Finally, we sought comment on whether proposed rates should be required to meet the net revenue test.[270]

123. Comments. Most of the LECs argue that the existing price cap rules are adequate for review of connection charges paid by interconnectors.[271] Some of the LECs and Dr. Alfred Kahn, testifying on their behalf, generally argue that connection charges should be priced at the LEC's incremental cost of providing interconnection plus a contribution calculated by subtracting the incremental costs of special access and interconnection services from the LEC's total revenues from those services.[272] Ameritech opposes any requirement that LECs provide fully distributed cost support for initial rates and subsequent rate changes, but argues that, under such an approach, a rate of return greater than 11.25% could be appropriate because expanded interconnection would greatly increase the LECs' business risk.[273]

124. GTE, SW Bell and Rochester generally support application of the net revenue test, which would require that they set rates for new services at levels high enough to avoid reductions in net revenues. They argue that an adequate level of contribution to general overheads would be guaranteed if the connection charges pass the net revenue test.[274] A number

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270 Notice, 6 FCC Rcd at 3266-68, ¶¶ 47-55.

271 See, e.g., U S West Comments at 25-29; BellSouth Comments at 67-70; SW Bell Comments, App. C at 4-5; Rochester Comments at 25-26; USTA Comments at 55.

272 See, e.g., Pacific Comments at 51; Bell Atlantic Comments at A-13-14; Kahn Affidavit at 16, 18.

273 Ameritech Reply Comments at 52-53, 61-63.

274 GTE Comments at 39-44; SW Bell Comments, App. C at 5-7; SW Bell Reply Comments at 66-70; Rochester Comments at 25-26; USTA Comments at 52-53.

of other LECs oppose application of the net revenue test, although they generally seek a high contribution element that would have an effect similar to connection charges meeting the net revenue test.[275]

125. The CAPs, IXCs, and users generally argue that the Commission should require the LECs to base their initial connection charge rates on demonstrated costs.[276] Several of these parties argue that the LEC prices for these services should reflect direct or incremental costs, without company-wide overhead allocations. Teleport Denver proposes that the Commission require full cost support data under Section 61.38 of our Rules for the initial filings.[277] MCI suggests the use of "Total Service--Long Run Incremental Costs," which includes some fixed costs, and proposes that the same 11.25% cost of capital used for pricing other services be used for pricing expanded interconnection, arguing that there is no justification for a risk premium when providing a bottleneck facility to competitors.[278] Ad Hoc proposes that LECs be required to provide central office space and related services to physically collocated interconnectors at the same rate the LECs would charge their unregulated affiliates for such space and services under their cost allocation manual treatment of affiliate transactions.[279] D.C. states that connection charges should be justified based on direct and overhead costs.[280] FMR, a CAP investor and customer, specifically argues that competition cannot develop if CAPs must pay retail prices for LEC services.[281] The CAPs oppose application of the net revenue test, asserting that it would result in connection charges high enough to stifle competition.[282]

126. A number of parties also advance proposals for pricing parity between connection charges for virtual and physical collocation. For example, Centel, Florida and Michigan propose pooling the cost of providing connections for virtual and physical collocation, and establishing an

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275 See, e.g., NYNEX Comments at 50-51; Bell Atlantic Comments at A-15-16; Pacific Comments at 48-50; SNET Comments at 21-22.

276 See, e.g., MFS Comments at 103-07; Locate Comments at 31-32; FMR Reply Comments at 13-14; Allnet Comments at 7; MCI Comments at 26; Ad Hoc Comments at 32-33; CompuServe Comments at 8-9; EDS Comments at 4-5; GSA Comments at 19; ICA Comments at 19.

277 Teleport Denver Comments at 12-13.

278 MCI Comments at 26; MCI Reply Comments at 52.

279 Ad Hoc Comments at 31.

280 D.C. Comments at 4.

281 FMR Reply Comments at 13-14.

282 See, e.g., MFS Comments at 102-03.

averaged connection charge rate for both types of interconnection.[283] Teleport argues that LEC charges for virtual collocation should be economically comparable to the costs that a CAP would incur under physical collocation.[284] MFS argues that to make virtual collocation as close an approximation of physical collocation as possible, the Commission should require that the same rate elements apply to both forms of interconnection. It argues that under virtual collocation, interconnectors should pay phantom or surrogate space occupancy charges, even though they would not actually occupy central office space, as well as the same connection charges applicable to physically collocated parties.[285] Locate argues that wage rates for maintenance and repair activities performed by the LECs should be priced to reflect CAP labor rates to preclude the LEC from earning undue profits.[286] The Bankers submit that the rate structure adopted should create pricing parity between the LECs and their competitors, and should ensure that LECs, not interconnectors, bear any reasonable costs associated with virtual collocation that would not be incurred if physical collocation were available.[287] Ad Hoc proposes different connection charges for virtual and physical collocation but overall pricing parity between the two types of collocation, lower rates for interconnectors that supply their own equipment, and a supplemental charge for virtual collocation customers that interconnect beyond the prescribed distance.[288]

127. Discussion. Given the fundamental nature of this restructuring of special access service and the importance of the connection charge rate levels to the development of economically sound competition benefiting customers, we conclude that the connection charge rate levels should receive the same scrutiny regardless of whether the rate changes would qualify as a rate restructure or a new service under the price cap rules.[289] In particular, we will require the LECs to develop and justify consistent methodologies for deriving the direct cost of providing similar types of new

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283 Centel Comments at 8-9; Florida Comments at 13; Michigan Comments at 9.

284 Teleport Comments at 8, 31.

285 MFS Comments at 76-77.

286 Locate Comments at 37-38.

287 Bankers Comments at 15-16.

288 Ad Hoc Comments at 29.

289 For the reasons set out below in our discussion of the net revenue test, see infra ¶ 129, however, the revenue neutrality test usually applied to restructured, unbundled basic serving elements (BSEs) will not apply to connection charges in the expanded interconnection context.

offerings, including expanded interconnection services covered by the connection charge rate elements.[290]

128. We will also require the LECs to justify any deviations from uniform overhead loadings that they propose for pricing connection charges, although we will not specify a particular methodology in advance.[291] Under this approach, if a LEC proposes to price connection charges to reflect fully distributed overhead loadings, we will compare such loadings to the overhead loadings used for other services and require justification for any differences in overhead loadings. The requirement that the LECs use a consistent direct cost methodology and justify any deviations from uniform overhead loadings in the tariff review process will give affected parties substantial protection, while according the LECs some flexibility in setting the initial rate levels for connection charge subelements.[292]

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290 Different direct costing methodologies could be used for different types of new offerings when justified by the LEC. This requirement reflects our policy for the pricing of new services adopted in the LEC Price Cap proceeding. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4531 (1991). Certain aspects of the new services test are not applicable in the context of expanded interconnection, however. For example, a risk premium would be inappropriate with respect to connection charges, since provision of expanded interconnection does not involve risky investment and technological research and development by the LECs. Similarly, we conclude that the pricing test applicable to new versions of existing services does not apply to connection charges for expanded interconnection. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 7 FCC Rcd 5235, 5236-37 (1992).

291 Contrary to the arguments of certain parties, we believe that it would not be reasonable to require the LECs to base their connection charges only on the direct costs of these services, with no loadings for overhead costs. Direct-cost-based pricing of connection charges, which would make these charges one of the few, if any, LEC offerings not recovering overheads, would either require all other LEC services to recover a proportionally greater share of such costs or require the LECs to forgo revenues. Moreover, the low charges for interconnection with LEC facilities resulting from this approach would give interconnectors false economic signals that could stimulate uneconomic entry into the access market.

292 Because expanded interconnection is a basic service offering, we decline to set the level of connection charges using the cost allocation methods that apply to transactions with unregulated affiliates. We believe that the approach we are adopting is more fully consistent with Commission precedent and will more effectively address concerns about discrimination and anti-competitive pricing. Nor is there a need to establish a fully distributed cost pricing floor for the connection charges in order to protect other ratepayers. The LECs have ample incentives to avoid underpricing the connection charges.

129. We also conclude that we should not require that connection charges meet the net revenue test.[293] Setting new service prices to satisfy the net revenue test would produce prices targeted to ensure that the carrier will not lose revenues through the offering of the new service over an extended period of time. This standard is inconsistent with a regulatorily mandated new service designed to subject LECs to the rigors of increased competition.[294] The main risk here is that LECs will seek to overprice the services used by competitors in order to deter entry. The net revenue test would not only fail to protect against this, but would tend to produce connection charges that substantially exceed the cost of providing expanded interconnection, undermining competition in the special access market.[295]

130. Finally, we decline to require that LECs set connection charges to ensure that interconnectors using virtual and physical collocation arrangements pay the same total prices. The services, equipment, and facilities LECs provide under virtual and physical collocation differ, as do the functions that the interconnector performs for itself.[296] We believe that the initial connection charges for both virtual and physical collocation should reflect the costs of the services that the LEC actually provides.[297]

131. We also reject the contentions that services provided by the LECs under physical or virtual collocation must be priced based on interconnectors' wage rates, rather than those of the LECs. To the extent that

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293 We recently concluded that the cost support requirements for new services made the net revenue test superfluous as a check on predatory pricing and decided no longer to require it for new LEC services in general. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 7 FCC Rcd 5235, 5237 (1992).

294 Indeed, inherent in the concept of competition is the potential loss of revenues by a competitor.

295 In fact, in this case, the net revenue test would function like a very high contribution element designed to recover lost contributions to LEC overheads -- a result that we reject in the section of this Order addressing the contribution element. See infra ¶ 144.

296 For example, the construction work necessary to prepare a central office for physical collocation typically would be greater than that required to provide virtual collocation. Also, under physical collocation, interconnectors use more central office floor space than is the case under virtual collocation. Under virtual collocation, however, the LEC performs installation, maintenance, and repair functions that the interconnector performs for itself under physical collocation.

297 Contrary to the concerns of certain parties about the pricing of virtual collocation, we emphasize that under our rules, neither virtual nor physical collocation would be priced as a discounted form of special access.

the LECs have higher wage rates, such a requirement could force the LECs to provide expanded interconnection services at a loss. We believe that the LECs are entitled to charge for those services based on their own wage rates. While this may result in higher charges for maintenance and repair under virtual collocation, we do not believe that this difference warrants mandatory use of interconnector wage rates for virtual collocation, particularly given that physical collocation will generally be available as an alternative and other charges, such as those for central office space usage, will lead to comparatively higher charges under physical collocation.[298]

3. Subsequent Rate Changes

132. Notice. We proposed amending the price cap rules to create a new, separate subindex consisting of connection charges and special central office charges for services used by interconnecting parties. We proposed to limit pricing flexibility for this service group to annual increases of 2% relative to the percentage change in the price cap index for the special access service basket.[299] We also sought comment on appropriate pricing standards for LECs subject to rate of return regulation.[300]

133. Comments. Most of the LECs generally oppose the proposal in the Notice, arguing that the existing protections in the price cap regime will be sufficient and that additional restrictions on price changes would be unnecessary and counterproductive.[301] They assert that 2% would be too narrow a banding limit, and that the Commission should follow its general determination in the price cap rules that a 5% band is adequate.[302]

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298 The requests by certain LECs for authorization of increased earnings levels in recognition of increased market risk flowing from expanded interconnection are beyond the scope of this proceeding.

299 Under this proposal, the connection and special central office service charges would also continue to be included in the four existing special access service groupings -- (1) voice grade, WATS, metallic and telegraph; (2) audio and video; (3) high capacity and digital data services; and (4) wideband data and wideband analog -- for purposes of applying the 5% banding restrictions applicable to those groupings. See Notice, 6 FCC Rcd at 3268, ¶¶ 57-60.

300 Id. at 3269, ¶¶ 61-63.

301 See, e.g., U S West Comments at 29-30; NYNEX Comments at 52-53; Ameritech Comments at 66-67; GTE Comments at 44-46; USTA Comments at 63.

302 See, e.g., BellSouth Comments at 70-71; GTE Comments at 44-45; United Comments at 15; USTA Comments at 60-63; SW Bell Reply Comments at 73; Ameritech Reply Comments at 48-50.

134. On the other hand, a number of CAPs and users support the 2% ceiling proposed in the Notice for the connection charge subindex.[303] MFS proposes an even narrower pricing limit: a cumulative maximum 2% increase over any three year period.[304] Several state commissions, such as D.C. and Michigan, and the SBA argue that the connection charge should not be subject to change under the price cap rules, with subsequent changes in the connection charge scrutinized under the same standard as the initial rates.[305] NTIA opposes the narrower 2% ceiling.[306] Justice supports additional scrutiny of subsequent changes in the connection charges due to the potential for anti-competitive pricing.[307]

135. Lincoln, a Tier 1 LEC under rate of return regulation, argues that existing rules for rate of return carriers provide adequate guidelines for rate justification, and that no new rules are necessary for these LECs.[308] Several commenters, however, express concern about review of subsequent rate changes by rate of return LECs to prevent discrimination or cross-subsidization. GSA suggests a requirement that transmission and connection charges be separately targeted to achieve their authorized rate of return,[309] while MFS argues that any change in the relative overhead loadings applicable to connection charges, central office services, channel terminations and channel mileage should trigger an investigation, absent compelling justification.[310]

136. Discussion. As discussed in detail elsewhere in this Order, we are permitting the LECs and interconnectors significant ability to negotiate some details of their virtual collocation arrangements, which would then be tariffed. Thus, different interconnectors may use different types of central office equipment under virtual collocation and structure the financial arrangements for this equipment differently. Space preparation necessary for physical collocation may also vary significantly.[311] Because this treatment will produce rate level differences that could easily distort

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303 See, e.g., ICC Comments at 15-16; Teleport Denver Comments at 13; Ad Hoc Comments at 33.

304 MFS Comments at 109-10.

305 SBA Comments at 31; D.C. Comments at 3-4; Michigan Comments at 14-15.

306 NTIA Reply Comments at 18-19.

307 Justice Reply Comments at 52-53.

308 Lincoln Comments at 11-12. See also USTA Comments at 54-55.

309 GSA Comments at 20.

310 MFS Comments at 111.

311 See supra ¶ 40, infra ¶¶ 158-59.

the results of price cap review, at least during the initial phases of expanded interconnection, we will not impose a separate price cap subindex with a 2% ceiling on rate increases for connection charges as proposed in the Notice. Under the original price cap rules, AT&T excluded special construction services and custom tariff services from price cap baskets because such services were not amenable to price cap treatment and because traditional regulatory procedures appeared to better protect consumers with respect to such services.[312] For similar reasons, we now designate expanded interconnection services covered by connection charges as services that are excluded from the LECs' price cap baskets.[313] We will apply non-streamlined tariff review standards to connection charges.[314] After the initial implementation phase, connection charges may be sufficiently uniform to permit price cap treatment.

137. We also conclude that the existing tariff review standards and procedures are adequate to prevent discrimination or cross-subsidization by rate of return LECs. Accordingly, we do not adopt additional requirements to govern subsequent changes in connection charges by rate of return LECs. We will also require that revenue from connection charges be included in the special access service category to measure earnings for purposes of determining compliance with the maximum allowable rate of return.[315]

C. Contribution Charge

138. Notice. While uncertain of the need for a contribution element, we requested comment on whether such a charge is necessary to alleviate any LEC hardship caused by changes resulting from expanded interconnection.[316] We stated that LECs would have to justify the initial level of any contribution charge, and proposed that changes to such charges be permitted only through further order or a prescribed formula, and not under the price cap mechanism.[317]

139. Comments. The LECs support a substantial contribution charge to help recover costs associated with geographic averaging, cross-subsidies

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312 Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3033-37 (1989) (AT&T Price Cap Order), pets. for rev. pending sub nom. AT&T v. FCC, No. 91-1178 (D.C. Cir., filed Apr. 16, 1991); 47 C.F.R. § 61.42(c)(1)-(4).

313 See 47 C.F.R. § 61.42(f).

314 The considerations which led us subsequently to streamline AT&T Tariff 12 offerings, see Interexchange Order, 6 FCC Rcd at 5893-96, 5902, are not applicable here.

315 See 47 C.F.R. § 65.702.

316 Notice, 6 FCC Rcd at 3265-66, ¶ 43.

317 Id. at 3267-68, ¶¶ 53, 58.

built into the separations and Part 69 rules, and the embedded cost of plant purchased to meet "carrier of last resort" obligations.[318] Several LECs included with their comments an affidavit by Dr. Alfred Kahn, who advocates a contribution charge generally equivalent to the revenues from the LECs' special access and interconnection services minus the incremental cost of providing these services, reduced to a per unit basis.[319] Some LECs argue that contribution need not be paid through a separate rate element, but should instead be recovered by including sufficient overheads in other rates.[320] These LECs argue that, in any event, the sum of connection and contribution charges should satisfy the net revenue test. Cincinnati Bell proposes a surcharge on interconnectors to recover costs for stranded investment due to bypass of the LEC network, among other things.[321]

140. Several LECs state that a contribution element could be transitional, being phased out as cross-subsidies are eliminated and rates aligned with cost.[322] NYNEX asserts that if the LECs are permitted to deaverage rates and to price in competitive areas closer to incremental costs, the loss in demand for LEC services would be less and the contribution element could be smaller.[323] SW Bell concedes that only a portion of the contribution lost due to increased competition can be recovered through charges related to expanded interconnection, and suggests alternative means

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318 See, e.g., Ameritech Reply Comments at 40-44; Bell Atlantic Comments at 11-13; BellSouth Comments at 71-76; BellSouth Reply Comments at 26-28; Pacific Comments at 62-63; Pacific Reply Comments at 58-65; SW Bell Comments, App. E at 5-10; SW Bell Reply Comments at 21-29 & App. A at 32-35; Centel Comments at 4-6; Cincinnati Bell Comments at 3-5; Cincinnati Bell Reply Comments at 14-16; USTA Reply Comments at 17-23.

319 See, e.g., Kahn Affidavit at 16, 18. See also Bell Atlantic Comments at A-13-14; BellSouth Comments at 74-75; Pacific Comments at 57-60.

320 GTE Comments at 43-44; USTA Comments at 52. Bell Atlantic and Dr. Alfred Kahn support applying the contribution charge to LECs as well as interconnectors, but argue that where a competitor threatens to completely bypass the LEC network, the LEC should be free to exclude the contribution element from the price of its own retail services to that customer. Bell Atlantic Comments at 13 n.31; Kahn Affidavit at 18.

321 Cincinnati Bell Comments at 5.

322 See, e.g., Ameritech Reply Comments at 42; BellSouth Reply Comments at 27-28; Cincinnati Bell Reply Comments at 4 n.6; SNET Comments at 19.

323 NYNEX Comments at 34-35.

of recovering the lost revenues.[324] Some LECs argue that failure to provide for a contribution element would constitute confiscation.[325]

141. NTCA proposes that cost flows to non-Tier 1 carriers that provide access services jointly with neighboring Tier 1 LECs should be considered in the design of a contribution element and the level of the charge.[326] Some state commissions assert that the LECs should be allowed to use a contribution charge to recover embedded costs or overheads that they cannot recover in a competitive environment.[327] D.C. also suggests including in the contribution charge accelerated depreciation of plant made obsolete by the new competition.[328]

142. Most of the other parties, including CAPs, IXCs, large users, NTIA, and Justice, argue that the Commission should not authorize a contribution charge for special access or that such a charge should be as small as possible.[329] These parties generally contend that a contribution charge for special access would help perpetuate non-economic rates, depress the use of interconnection, and unfairly insulate LECs against competitive losses, undermining incentives for increased LEC efficiency. A number of the

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324 SW Bell Comments at E-16-17. It suggests some potential vehicles for contribution recovery, including increases in the End User Common Line, a surcharge on all or selected remaining services, and a deaveraged rate structure which embodies the cost/rate relationship principles discussed in the ONA proceeding.

325 See, e.g., SW Bell Comments, App. E at 10-12; BellSouth Comments at 76.

326 NTCA Comments at 3; NTCA Reply Comments at 10-13; TDS Reply Comments at 31.

327 See, e.g., California Comments at 7; D.C. Reply Comments at 5-6. See also Florida Comments at 11-12 (arguing for contribution to be included in connection charges, not broken out as separate element); Pennsylvania Consumer Advocate Comments at 2 (arguing for contribution element to eliminate any impacts on basic service rates, particularly in high-cost areas).

328 D.C. Reply Comments at 5.

329 See, e.g., Teleport Comments at 46-47; MFS Comments at 82-86; FMR Comments at 18; Locate Comments at 32; ICC Comments at 16; ALTS Comments at 27-29; MFS Reply Comments at 71-78; Teleport Reply Comments at 10-12; FMR Reply Comments at 20-24; Teleport Denver Reply Comments at 12; AT&T Comments at 11-12; AT&T Reply Comments at 10-12; MCI Comments at 27; Sprint Comments at 12-13; MidAmerican Reply Comments at 7; WilTel Comments at 25; ICA Reply Comments at 11-17; Ad Hoc Comments at 30-31; Ad Hoc Reply Comments at 14-17; Bankers Reply Comments at 17-18; CompuServe Comments at 9; EDS Comments at 5; Intermedia Reply Comments at 2; GSA Comments at 16-19; SBA Comments at 30; NTIA Reply Comments at 19-21; Justice Reply Comments at 58-66.

parties opposing a contribution charge argue that given recent decreases in special access rates and existing volume discounts, special access includes little or no support for other services. Some of these parties contend that before the Commission orders creation of a contribution element, the LECs should be required to demonstrate that expanded interconnection would cause a loss of contribution to other services. They also argue that revenue from any contribution element should be targeted to support specified public policy goals. The CAPs strenuously object to a contribution charge designed to recover LEC overhead costs.[330]

143. Discussion. As discussed in more detail below, we believe that all market participants should contribute to regulatorily mandated support flows reflected in the LECs' rates for services subject to competition. We are not permitting the implementation of a contribution charge absent further Commission action, however. Instead, we are proposing to eliminate the only support flow that appears to warrant a contribution charge based on the current record. We will, however, permit the LECs to seek approval of a contribution charge based on other support flows.[331]

144. At the outset, we reject the method for developing a contribution charge proposed by many of the LECs and Dr. Kahn, who advocate allowing the LECs to recover a contribution amount generally equivalent to their special access and interconnection revenues minus their incremental cost of providing these services. This approach would force interconnectors to bear a significant portion of LEC overheads and would tend to result in an unduly high contribution element, unreasonably discouraging the use of expanded interconnection. Ultimately, such an approach would reduce the consumer benefits of competition as an incentive for improved LEC efficiency and innovation. We are therefore rejecting this proposed method for calculating the contribution charge.[332] A contribution charge designed to satisfy a net revenue test would assure that the LECs continue to recover the same amount of revenue after the implementation of expanded interconnection as before, and would also be objectionable for the reasons cited above.

145. On the other hand, the LECs' rates for various access services may reflect certain regulatorily mandated support mechanisms designed to achieve social policy objectives. In a competitive environment, we believe that all market participants must be required to share the cost of such support mechanisms. While an excessive contribution charge would

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330 See, e.g., MFS Reply Comments at 78; Teleport Reply Comments at 10-12; FMR Reply Comments at 21.

331 Upon Commission approval of its request, the LEC could revise its tariffs to include a contribution charge to reflect the specified support flows.

332 The price cap system and other Commission rules give the LECs an adequate opportunity to recover general overhead revenues lost when customers take service from an interconnector. We therefore reject the argument that failure to provide for a contribution element constitutes confiscation.

suppress demand for expanded interconnection and dampen the LECs' incentives to improve efficiency and lower prices in response to competition, imposing support burdens only on the LECs would also distort the competitive marketplace by forcing the LECs to charge rates in excess of their cost of providing the service. Accordingly, we reject the argument that the LECs should not, under any circumstances, be allowed to include a contribution charge in their expanded interconnection tariffs.

146. We believe that any contribution charge in LEC expanded interconnection tariffs should be targeted to recover only specifically identified regulatory support mechanisms or non-cost-based allocations that are embedded in LEC rates for special access services subject to competition. This would ensure a fair distribution among all market participants of the responsibility for support flows currently imposed by our regulations, while minimizing market disruption.[333]

147. Based on the present record, the only significant non-cost-based support flow imposed by our regulations affecting special access is the over-allocation of General Support Facilities (GSF) costs to special access. This results from the Part 69 requirement that the LECs exclude subscriber loop investment when allocating GSF overhead costs among access categories.[334] That requirement causes substantial under-allocations of costs to the common line category and over-allocations to other categories, including both special access and switched transport. Several LECs submit that revising that rule would reduce their annual interstate revenue requirements for both special access and switched transport by substantial amounts.[335] The LECs have not shown that any other regulatorily-imposed support flows significantly affect their special access revenue

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333 Any such charge would be structured as a separate rate element applying equally to interconnected circuits and similar LEC services. Moreover, any contribution charge should recover revenues no greater than the demonstrated regulatory support flows that the LEC currently recovers in the rates for services subject to competition. See infra note 412 for a definition of the services deemed subject to competition.

334 47 C.F.R. § 69.307 (excluding Category 1.3 Cable and Wire Facilities from apportionment of GSF investments). See also 47 C.F.R. § 36.154(a) (defining Category 1.3).

335 Ameritech Comments at 42 (rule change would decrease interstate special access revenue requirement by $28 million); Bell Atlantic Comments at 10 n.21 ($25 million decrease in interstate special access costs); NYNEX Comments, Exh. F at 6 ($31 million decrease in New York and Massachusetts); Pacific Comments at 27 n.32 ($20 million decrease for Pacific Bell); SW Bell Reply Comments, App. C at 14 ($23.4 million decrease); Cincinnati Bell Reply Comments at 17-18 ($1.6 million or $2.1 million decrease out of a total $19.5 million special access revenue requirement).

requirements.[336] Accordingly, we will not allow the LECs to include amounts related to other possible support flows in a contribution charge absent further Commission action. LECs asserting that other support flows exist and seeking to reflect them in a contribution charge must obtain Commission approval prior to filing tariffs designed to implement such a charge.

148. Although in principle it would appear reasonable to allow the LECs to impose a contribution charge to recover GSF over-allocations, in practice such a policy raises several serious problems. First, it is very difficult to determine how much of the GSF support flows are included in rates for LEC services subject to competition -- i.e., DS1 and DS3 services. Most of the Tier 1 price cap LECs have substantially reduced their DS1 and DS3 rates in recent years, and it therefore appears likely that rates for such services recover significantly less GSF support amounts than do other special access services. The methodologies we have identified for determining how much GSF support is embedded in high capacity service rates appear to be inherently arbitrary. Given our general concerns about the competitive impact of contribution charges, we believe that instead of allowing a contribution charge, it would be far more desirable to revise the Part 69 rules to allocate GSF costs proportionally to all service categories. In a Notice of Proposed Rulemaking contained in this document, we therefore

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336 Some LECs argue that study-area-wide pricing and the averaging of the costs of different technologies constitute regulatorily-imposed support flows. We address these issues below in our discussion of geographic rate differentials. See infra ¶¶ 172-86. Similarly, some LECs assert that our depreciation policy results in non-cost-based allocations. The adequacy of depreciation rates is beyond the scope of this proceeding. Moreover, other alleged over-allocations raised by the LECs primarily affect switched access categories and have no (or a de minimis) impact on special access. These include: the use of a frozen Subscriber Plant Factor (SPF) rather than actual Subscriber Line Usage (SLU) to allocate certain non-traffic sensitive loop plant costs; the allocation of tandem switching costs; the non-distance sensitive allocation of interexchange trunk circuit equipment; and contributions to long-term and transitional carrier common line support pools. Ameritech Reply Comments at 60-61; NYNEX Comments, Exh. F at 3-4 & 6-9; SW Bell Reply Comments, App. C at 12-13 & 15-16. The alleged over-allocation of marketing expense raised by Pacific is being addressed by the Joint Board, and the over-allocation of central office equipment alleged by Pacific is de minimis, and we are not convinced based on the present record that it is unreasonable. Pacific Comments at Exh. B. Finally, we lack sufficient information on the current record to determine whether subsidy flows in services provided jointly by Tier 1 and smaller LECs should be taken into account in designing any contribution charges, and we will therefore not permit inclusion of such alleged flows in contribution charges. See also Transport Order at n.178.

propose to revise Section 69.307 in this fashion, and seek comments on this issue.[337]

149. Accordingly, the LECs will not be allowed to include any contribution charge in their initial or subsequent expanded interconnection tariffs absent further Commission action. We reach this decision not because we oppose contribution charges in principle. On the contrary, we believe that where support flows imposed by regulation can be demonstrated to affect the rates of LEC services subject to competition, similar support burdens should be imposed on interconnecting competitors. Rather, we reach this result because we propose to eliminate, in the very near future, the only substantial support flow that has been demonstrated in this proceeding.[338] Our proposal for amendment of the Part 69 rules governing the allocation of GSF costs is discussed in more detail below.[339]

D. Tariffing

150. Notice. We sought comment on the benefits and drawbacks of using general tariffs or individual contracts for charges for LEC central office space under physical collocation.[340] With respect to virtual collocation, we noted that interconnecting parties might wish to purchase the central office equipment that would be dedicated to their use and that tariffs for this central office electronic equipment could reflect the terms

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337 We also ask interested parties to propose specific methodologies for calculating a GSF contribution charge for use in the event that we do not ultimately adopt our proposal for reallocation of GSF costs. See infra ¶¶ 267-69.

338 Given our intention to expeditiously consider revision of the current rule governing the allocation of GSF costs, there should be no more than a few months between the effective date of the LECs' interstate expanded interconnection tariffs and action on our proposal for the reallocation of GSF costs. The LEC tariffs implementing expanded interconnection will not become effective until approximately eight months after adoption of this Order, except in the case of LECs that already have intrastate expanded interconnection arrangements in effect and are required to implement interim tariffs. In light of this and the administrative difficulties associated with implementing a contribution charge, we believe that provision for an interim contribution charge is not necessary. In the case of price cap LECs, the low end adjustment procedures which permit rate increases if LEC earnings dip below a pre-determined level will provide adequate protection given the limited time period involved. If the Commission determines that GSF costs should not be reallocated to eliminate the current support flows, we would allow inclusion of GSF costs in a contribution charge to the extent that they are recovered through the charges for services subject to competition. See infra ¶¶ 267-69.

339 See infra ¶¶ 243-45.

340 Notice, 6 FCC Rcd at 3265, ¶ 42.

of individual contracts between LECs and interconnectors rather than generally available tariff rates.[341]

151. Comments. The LECs generally argue that charges for space usage for physical collocation should be governed by individually negotiated contracts, not tariffs.[342] They contend that rates and terms would be complex and would have to be tailored for individual central offices. SW Bell and NYNEX propose that the standard connection charge be tariffed, but argue that given the diversity of central offices and customer requirements, the other, more variable aspects of both physical and virtual collocation should be subject to negotiated contracts, which the Commission could inspect to ensure non-discrimination.[343] A number of the LECs also assert that space rental is not a Title II communications common carrier service and therefore cannot be tariffed.[344] AT&T proposes that LECs charge interconnectors on an individual case basis for installation and maintenance of special equipment dedicated to interconnectors that the LECs do not ordinarily use.[345]

152. Most of the CAPs, non-dominant IXCs, and certain users urge the Commission to require that all services be offered under tariff, so as to ensure nondiscrimination.[346] Certain of them, however, request the flexibility to negotiate the terms and conditions of their arrangements with the LECs, arguing that negotiated arrangements would provide flexibility to accommodate varying central office configurations and equipment types.[347] The users generally assert that terms should be publicly disclosed and

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341 Id. at 3265, n.29.

342 See, e.g., NYNEX Comments at 27-31; Bell Atlantic Comments at A-12-13; U S West Comments at 49-51; SW Bell Comments, App. C at 9-10; Centel Comments at 9-11; SNET Comments at 18-19; Cincinnati Bell Comments at 6-7; Lincoln Comments at 7-8; USTA Comments at 33-35; Rochester Reply Comments at 16-17.

343 See, e.g., SW Bell Reply Comments at 74-77; NYNEX Reply Comments at Exh. 2, Exh. 7.

344 See, e.g., NYNEX Comments at 28-29; Bell Atlantic Comments at A-12; U S West Comments at 49-51; SW Bell Comments at C-9-10; Centel Comments at 9-11; Cincinnati Bell Comments at 6-7.

345 AT&T Comments at 16.

346 See, e.g., MFS Comments at 73-75; Locate Comments at 28-29; Indiana Digital Access Comments at 9-10; Allnet Comments at 5; CompTel Comments at 15-17; CompTel Reply Comments at 18-20; MidAmerican Reply Comments at 7; Ad Hoc Comments at 30; UTC Comments at 10; ICA Reply Comments at 15; Ohio LINX Ex Parte at 1 (Sept. 8, 1992).

347 See, e.g., Teleport Denver Comments at 11; ICC Comments at 13-14; API Comments at 19-20; ICA Comments at 17-18.

available on a nondiscriminatory basis.[348] CompTel argues that central office space is "incidental" to communications service and can be tariffed.[349]

153. The Illinois and Michigan commissions argue that to prevent discrimination, all arrangements negotiated between LECs and interconnectors should be made public and available for purchase by other interconnectors.[350] The Florida commission suggests that if interconnectors have the option of taking physical or virtual collocation, LEC-CAP negotiations and market forces would generate reasonable space allocations and rates, but argues for tariffed rates for power and other central office support services so as to avoid LEC discrimination against interconnectors.[351]

154. NTIA suggests that LECs and interconnectors be allowed to negotiate interconnection agreements on an individual case basis, but argues that such agreements should eventually be tariffed so that the Commission can ensure nondiscrimination.[352] Justice contends that the Commission should require tariffing of central office space as part of the connection charges. It argues that this would eliminate discrimination and clarify the Commission's jurisdiction over the provision of real estate for interconnection purposes. Justice states that this would not preclude LECs from setting different tariffed rates for each central office to reflect the varying market value of space.[353] SBA recommends that the LECs be required to file tariffs for space rental, but that interconnectors be permitted to negotiate off-tariff contracts with the LECs.[354]

155. Discussion. This proceeding involves two issues regarding how the LECs should tariff expanded interconnection offerings. The first question is whether the LECs should be required to offer such services through tariffs at generally available, averaged rates, or whether they should be permitted to provide these services pursuant to individually negotiated tariff provisions. The second question is whether central office space usage under physical collocation can be tariffed under the Communications Act.

156. General v. Individually Negotiated Tariffs. We recognize the need for flexibility in structuring certain elements of expanded inter-

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348 See, e.g., Bankers Comments at 17-18.

349 CompTel Comments at 16-17.

350 Illinois Comments at 8-9; Michigan Comments at 10, 12.

351 Florida Comments at 13-14.

352 NTIA Reply Comments at 10-12.

353 Justice Reply Comments at 39.

354 SBA Comments at 28-29.

connection tariffs to meet the individual needs of interconnectors and the conditions in different LEC central offices. At the same time, we recognize the need to protect interconnectors from discrimination by the LECs.

157. In light of the LECs' substantial market power over expanded interconnection offerings, and their incentive to set the terms and conditions of such offerings in a manner that is disadvantageous to interconnectors, we believe that tariffing requirements must be established to prevent anticompetitive pricing and discrimination. Accordingly, the LECs are to tariff general terms and conditions applicable to their physical collocation and to their virtual collocation expanded interconnection offerings.[355] We will require that the LECs provide the following expanded interconnection elements pursuant to generally available tariffs at study-area-wide averaged rates under both physical and virtual collocation: (1) the cross-connect element, which covers the short cable connection from the LEC distribution frame to the central office electronic equipment owned by or dedicated to the interconnector; and (2) any contribution charge that may be permitted in the future. Since these elements will be fairly standard, we see no need for the greater flexibility possible with use of individually negotiated tariff provisions.

158. We also conclude, with respect to certain other connection charge elements, that charges may reasonably differ by central office due to variations in costs, but should be uniform for all interconnectors in each individual central office. These elements include: (1) charges for central office space usage under physical collocation, which must be tariffed at a uniform charge per square foot (or other unit) of space for all interconnectors in any given central office; (2) labor and materials charges for initial preparation of central office space under physical collocation and for installation, repair, and maintenance of central office electronic equipment dedicated to interconnectors under virtual collocation;[356] and (3) other charges that reasonably can be standardized for each central office, such as those for power, environmental conditioning, and use of riser and conduit space. If different interconnectors use different amounts of space, desire arrangements that require different amounts of time and materials to construct, or have different preferences regarding installation, maintenance, and repair by LEC personnel, total charges will differ accordingly, but the unit charges should be uniform in each central office.

159. On the other hand, it appears that the rates, terms, and conditions for the use of different types of central office electronic equipment dedicated to interconnectors under virtual collocation are best tailored to reflect individual circumstances. For example, interconnectors may wish to use different types of central office equipment with

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[355] While the terms and conditions for expanded interconnection offerings may differ, they must be generally available.

[356] Labor and materials charges may include appropriate overhead loadings. Labor rates may also differ by type of personnel or by time of day.

significantly differing costs, or LECs and interconnectors may negotiate different financial arrangements.[357] We will allow the LECs and interconnectors to negotiate the rates, terms, and conditions of such connection charge subelements, but will require the LECs to file those rates, terms, and conditions, which must then be made available to all similarly situated interconnectors under tariff.[358] We expect LECs and interconnectors to cooperate in developing the terms and conditions of interconnection arrangements within the guidelines we establish in this Order.[359]

160. Tariffing of Central Office Space Usage. We believe that the public interest requires tariffing of LEC central office space usage under physical collocation in order to prevent anticompetitive or discriminatory pricing.[360] Absent tariff regulation by the Commission, LECs could undermine the viability of expanded interconnection by over-charging

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[357] For example, in some instances, the interconnector and the LEC may agree that the LEC will purchase interconnector central office equipment from third-party vendors and recover these costs from interconnectors through connection charges. In other situations, they may agree that the LEC will purchase or lease this equipment from the interconnector, with tariffed charges paid by the interconnector based on the purchase or lease price.

[358] See Sea-Land Service, Inc. v. ICC, 738 F.2d 1311 (D.C. Cir. 1984) (individually negotiated rates are not per se unreasonably discriminatory, in violation of Interstate Commerce Act, if tariffs embodying contract rates are filed and are generally available to others similarly situated); MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 38 (D.C. Cir. 1990) (same principle applies under Communications Act). See also Maislin Indus., U.S. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990).

[359] If the LECs and interconnectors are unable to reach agreement on all interconnection provisions, the LECs will be required to file expanded interconnection tariffs in accordance with the schedule established herein. See infra ¶¶ 259-63. Of course, this does not prevent the negotiation of expanded interconnection arrangements after the filing of the initial tariffs.

[360] The New York Public Service Commission, in its order approving New York Telephone's physical collocation offering, required that the space usage rates and conditions established for each central office be filed as an attachment to the tariff and be made available to other interconnectors, and reserved the authority to regulate central office space offerings through the formal tariff process if necessary. Order Regarding OTIS II Compliance Filing, Cases 29469 and 88-C-004 (N.Y. PSC May 8, 1991), slip op., Analysis at 43-44. The Massachusetts Department of Public Utilities concluded that it has jurisdiction over physical collocation space, which is ancillary to the provision of telecommunications service, and ordered that the charges for such space be tariffed. Complaint of Teleport Communications-Boston Seeking the Provision of Certain Interconnection Arrangements from the New England Tel. and Tel. Co., D.P.U. 90-206, D.P.U. 91-66, at 27-30 (Mass. Dept. Pub. Util. July 31, 1991).

interconnectors for floor space, power, and environmental conditioning. With today's fiber optic and microwave technology, electronic equipment collocated in the LEC central office is necessary to provide interconnected circuits.[361] Therefore, the use of LEC central office space is an essential element of physical collocation for which competitive alternatives are not available. Absent tariff oversight, the LEC could seriously undermine the utility of physical collocation through the terms and conditions for central office space usage.

161. We conclude that we have statutory authority to impose such a requirement in the present circumstances. Title II of the Communications Act gives the Commission specific regulatory authority over common carriers engaged in the provision of interstate or foreign communications service.[362] Our authority to require LECs to tariff, pursuant to Title II, central office space for physically collocated expanded interconnection is thus dependent on whether such a service is both a "communications service" and provided on a "common carrier" basis. We conclude that central office space for physical collocation satisfies both criteria.

162. First, central office space for physical collocation is a communications service. The Act defines communications to include: "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery . . .) incidental to" communications.[363] We conclude that central office space for physical collocation is an "incidental" service and thus falls within the statutory definition of communications.[364] The Commission has held offerings to be "incidental" to

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361 To cross-connect a CAP's (or other party's) high capacity circuits to a LEC's distribution frame, the CAP's electronic circuit terminating equipment must be in the same building as the LEC distribution frame. See MFS Comments at 48-49 & n.69 (technological standards applying to cross-connects essentially require that equipment be in same building).

362 47 U.S.C. §§ 201-226.

363 47 U.S.C. § 153(a).

364 The legislative history manifests a Congressional intent that the "incidental to" language in the Act be interpreted broadly. See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Tentative Decision, 72 FCC 2d 358, 414-16 & nn.84-89 (1979). More specifically, the "incidental to" language in the Communications Act stems from the 1906 Hepburn Amendment to the Interstate Commerce Act of 1887, 34 Stat. 584, originally codified at 49 U.S.C. § 1(3)(a), partially revised and currently codified at 49 U.S.C. § 10102(26). In that amendment, Congress authorized the Interstate Commerce Commission to assert jurisdiction over such railroad activities as the leasing of railroad cars, trackage, and other facilities by expanding the definition of "transportation" to include "all instrumentalities and facilities of shipment or carriage . . . and all services in connection with the receipt, delivery, . . . storage and handling of property transported." 49 U.S.C. § 1(3)(a).

communications, and therefore communications services themselves, if they are an integral part of, or inseparable from, transmission.[365] The use of LEC central office space is an integral part of expanded interconnection through physically collocation and is necessary to complete calls using this form of interconnection.[366] Without access to this space, interconnectors could not make use of physical collocation for the carriage of interconnected communications, and transmission of common carrier communications could not take place.[367]

163. Moreover, we conclude that LEC central office space offerings for physical collocation constitute common carriage. We are specifically

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365 For example, the Commission has determined that calling card validation information is "incidental to" communications service under Section 3(a) of the Communications Act. 47 U.S.C. 153(A). See Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 7 FCC Rcd 3528, 3531-32 (1992), pet. for recon. pending, pet. for review pending, Capital Network System Inc. v. FCC (D.C. Cir., filed June 14, 1991) (LEC validation and screening services are "not severable from the underlying local exchange transmission service" and are a "byproduct of [the LECs'] local exchange service"). See also Cincinnati Bell Tel. Co., 5 FCC Rcd 805, 808 (1990), 6 FCC Rcd 3501, 3504 (1991), pet. for recon. pending; Graphnet Systems, Inc., 73 FCC 2d 283, 287-90 (1979).

366 Like the telephone numbers used in LEC credit card screening and validation services, the ability to provide central office floor space for expanded interconnection is incidental to the LECs' provision of local exchange and access services.

367 The provision of central office space for physically collocated expanded interconnection differs in important respects from the leasing of pole attachment space for cable television. In California Water and Tel. Co., 64 FCC 2d 753, 758-60 (1977), we held that utility pole attachments (including those of telephone companies) offered to cable television operators were too remote from cable television service to be considered incidental to transmission. In contrast to this, the provision of central office space is intimately related -- indeed, is indispensable -- to physically collocated expanded interconnection, and thus to the actual transmission of common carrier communications. While pole owners were not themselves involved in cable television transmission, id. at 759, a LEC providing central office space as part of expanded interconnection is in fact itself involved in the actual transmission of common carrier communications by virtue of the interconnection with the LEC's local exchange transmission facilities. Under physical collocation, the LEC-provided cross-connect between the interconnector's equipment and the LEC distribution frame is indisputably a common carrier communications service. Without space in the LEC central office for the location of its equipment, an interconnector cannot make use of the cross-connect. Therefore, the provision of central office space for purposes of expanded interconnection properly must not be viewed in isolation, but rather as an integrated component of the overall expanded interconnection service.

requiring that the LECs make expanded interconnection available to all interested parties on a nondiscriminatory basis, regardless of their status as CAPs, IXCs, or end users.[368] The nondiscriminatory provision of expanded interconnection through physical collocation requires that LECs offer central office space to all interconnectors, rather than making individualized decisions whether and on what terms to make this offering available. Central office space for physical collocation can therefore be distinguished from other types of offerings, which courts and the Commission have held need not be tariffed because they can be provided separately from communications offerings, can be provided competitively by non-carriers, or can be offered on the basis of individualized decisions whether and on what terms to deal. For example, unbundled offerings of customer premises equipment (CPE),[369] enhanced services,[370] inside wiring,[371] and billing and collection[372] have been deemed not to be "common carriage" on such grounds. By contrast, space usage for physical collocation is necessary for transmission over interconnected circuits using fiber optic and microwave technologies, can be provided only by LECs, and must be offered on a generally available basis. No competing space provider can offer space that would make possible the ubiquitous interconnection to the remaining, non-competitive portions of the LEC networks. Accordingly, we find that the public interest requires that

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368 See supra ¶ 65. Offering expanded interconnection on a non-common carrier basis could thwart achievement of our objectives in this proceeding and constitute an unjust and unreasonable discrimination.

369 See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, 450-51 (1980) (holding that the Commission has legal authority to require that CPE be detariffed and unbundled from tariffed communications, even though the Commission would have authority to tariff CPE offered in conjunction with communications), recon., 84 FCC 2d 50, 98-105 (1981), aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198, 210 (D.C. Cir. 1982) (Commission's decision was reasonable in light of "the severability of CPE from transmission services and the competitive nature of the CPE market"), cert. denied, 461 U.S. 938 (1983).

370 See Second Computer Inquiry, Final Decision, 77 FCC 2d at 420-21, 428, 430-35, recon., 84 FCC 2d at 54; 47 C.F.R. § 64.702 (defining enhanced services).

371 Detariffing the Installation and Maintenance of Inside Wiring, 1 FCC Rcd 1190, 1192 (1986), recon., 3 FCC Rcd 1719 (1988), rev'd in part sub nom. National Ass'n of Reg. Util. Comm'rs v. FCC, 880 F.2d 422, 428-30 (D.C. Cir. 1989) (reversing preemption of state regulation, but affirming use of Commission's "ancillary" authority to detariff inside wiring in order to encourage competition).

372 Detariffing of Billing and Collection Services, 102 FCC 2d 1150, 1168, recon. denied, 1 FCC Rcd 445 (1986), judicial review denied sub nom. Public Serv. Comm'n of Maryland v. FCC, 909 F.2d 1510, 1513-14 (D.C. Cir. 1990).

the subject LECs provide floor space and associated power and other utilities on a non-discriminatory, common carrier basis.[373]

E. LEC Special Access Offerings

1. Pricing and Rate Structure Flexibility for LEC Special Access Offerings

164. Notice. We stated that with the advent of competition, the LECs may need added rate structure flexibility to compete for special access traffic, but added that we might wish to proscribe certain forms of competitive response as unfair.[374] We asked for comment on whether guidelines should be developed for review of LEC rate structure responses to competition such as volume discounts, distance-sensitive pricing, and differential pricing of customer premise-to-end office (loop-side) and end office-to-IXC POP (trunk-side) links. We stated, however, that we did not propose to change the rate bands currently applicable to the LECs' DS1 and DS3 offerings.[375] We requested comment on whether the LECs should be accorded additional pricing flexibility for DS1 and DS3 services at some point in the future.[376]

165. Comments. The LECs argue that if the Commission orders expanded interconnection for special access, it should grant the LECs additional pricing and rate structure flexibility to respond to competition. The LECs advance various proposals for flexibility, although most support some combination of the following: (1) customer-specific service offerings[377] or responses to competitive bids;[378] (2) geographic rate

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373 National Ass'n of Reg. Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). Using this reasoning, the Commission has determined that calling card validation information and a physical delivery service are subject to Title II regulation. Graphnet Systems, Inc., 73 FCC 2d 283, 287-90 (1979) (both electronic transmission and physical delivery portions of a Mailgram-type service were common carrier communications service subject to Title II). See also Cincinnati Bell Tel. Co., 5 FCC Rcd 805, 808 (1990), 6 FCC rcd 3501, 3504 (1991), pet. for recon. pending.

374 Notice, 6 FCC Rcd at 3266, ¶ 45.

375 Id. at 3268, ¶ 59.

376 Id. at ¶ 60.

377 See, e.g., NYNEX Comments at 36, 44-45; Bell Atlantic Comments at 7; Pacific Comments at 43; Ameritech Comments at 39; BellSouth Comments at 42-43; GTE Comments at 22, 49; Cincinnati Bell Reply Comments at 7-9; USTA Comments at 59; SW Bell Reply Comments at 31-32 & App. E at 9-14 (proposing designation of "Competitive Market Segments" where LECs do not have market power and could enter individual case basis arrangements or contracts supported by filed tariffs effective upon 14-day notice).

differentials;[379] (3) differential pricing of loop-side and trunk-side channel terminations;[380] (4) elimination (or relaxation) of the price cap banding constraints on DS1 and DS3;[381] and (5) streamlined tariff review to facilitate timely LEC competitive responses.[382]

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511 See, e.g., Ameritech Comments at 39; BellSouth Comments at 42-43. Some LECs support individual case basis pricing authority, but state that volume discounts are a second-best way to accomplish similar results. NYNEX Reply Comments at 20 n.39. See also Centel Comments at 4; Rochester Comments at 28.

379 All of the larger LECs support some form of geographic rate differentials. United specifically proposed creating a number of zones based on traffic density within given study areas, with averaged pricing in each zone. United Comments at 16-21; United Reply Comments at 6-9; United Ex Parte at 1-3 (Sept. 9, 1992). USTA, SW Bell, and NYNEX made similar proposals. SW Bell Ex Parte at 16-22 (July 8, 1992) (advocating creation of Competitive Market Areas (CMAs) where LECs could reduce rates by up to 15% pursuant to separate price cap subindexes, and could respond to competitive offers with individual case basis contracts; and Transitional Market Areas, where existing price cap rules would apply); USTA Ex Parte (July 1, 1992) (same proposal); NYNEX Ex Parte at 2-16 (Aug. 20, 1992) (similar proposal, except banding limits would be eliminated in CMAs). See also Ameritech Comments at 21, 39; NYNEX Comments, Exh. F at 2-3; Bell Atlantic Comments at 7-8; Bell Atlantic Reply Comments at 9; Pacific Comments at 43-48; BellSouth Comments at 37-39; BellSouth Ex Parte at 3 (Sept. 10, 1992); GTE Comments at 22, 46-49; GTE Reply Comments at 33-37; SNET Comments at 18; Cincinnati Bell Reply Comments at 5-7; SW Bell Reply Comments, App. C at 11; U S West Reply Comments at 51-54.

380 Bell Atlantic Comments at 7 n.16; Pacific Comments at 46.

381 See, e.g., Pacific Comments at 32-34; BellSouth Comments at 39; USTA Comments at 59; GTE Comments at 49 (supporting elimination of bands constraining special access basket); Ameritech Comments at 40 (arguing for redefinition of subindexes based on functional categories rather than the current product line definitions); Bell Atlantic Comments at 5; Bell Atlantic Reply Comments at 10 (citing criteria for loosening regulation of AT&T in Interexchange proceeding). SW Bell proposes eliminating the four service categories and the DS1 and DS3 subindexes, and instead creating geographic zone classifications based on cost, market, and volume differentials, each of which would have a price index. The upper and lower banding ranges would be widest in the zone subject to the most competition, and progressively narrower in less competitive zones. SW Bell Reply Comments, App. E at 15-19.

382 See, e.g., BellSouth Comments at 35-36; GTE Comments at 49; USTA Comments at 60; Cincinnati Bell Reply Comments at 11-13; Centel Comments at 4; Bell Atlantic Comments at 9 (proposing 14-day notice for effectiveness of new or repriced special access services); Pacific Comments at 33-34; Ameritech Comments at 39-41 (arguing for one day notice).

166. The LECs argue that allowing CAPs to compete freely while restraining LEC flexibility would create an unfair and unnecessary price umbrella that would protect competitors and deprive customers of the benefits of competition.[383] They contend that even a short delay in granting them pricing flexibility would make it economically necessary for large IXCs and business users to construct their own transmission facilities or use the services of a CAP.[384] Many of the LECs say that, even in the absence of pricing limits, they could not successfully engage in predatory pricing since the IXCs could avoid excessive rates by taking advantage of expanded interconnection directly even if a LEC succeeded in driving CAPs out of the market.[385] These LECs argue that if long run incremental cost (plus any contribution element charged to interconnectors) is the price floor, the market ultimately will dictate the price ceiling.[386] NYNEX and Rochester submit that LECs should be permitted to raise rates for DS1 and DS3 services by up to 25% annually, and to lower them to incremental costs on an individual case basis.[387]

167. The CAPs and the IXCs generally argue that the LECs already have substantial pricing flexibility under price caps, and that until additional competition for both switched and special access has developed, no further flexibility is appropriate.[388] These parties express concern that the LECs will exploit their monopoly service customers and engage in anticompetitive practices to thwart entry. Several IXCs say that the pricing flexibility requested by the LECs would permit LECs to discriminate against small IXCs in areas where competition is weakest. They argue that pricing flexibility is inappropriate because local access competition has not yet

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383 See, e.g., Pacific Reply Comments at 21-32; SW Bell Reply Comments at 30-50; GTE Reply Comments at 42-49; USTA Reply Comments at 6-7, 23-27; Ameritech Ex Parte at 15 (Sept. 1, 1992).

384 See, e.g., NYNEX Reply Comments at 7-9; SW Bell Reply Comments at 39.

385 See, e.g., NYNEX Comments at 45; Pacific Comments at 41-42; BellSouth Comments at 40-41; Bell Atlantic Reply Comments at 10-11; Rochester Reply Comments at 22-23; SW Bell Ex Parte at 9-11 (July 8, 1992).

386 See, e.g., SW Bell Comments, App. C at 7-8 & App. E at 2; USTA Reply Comments at 30.

387 NYNEX Reply Comments at 20 n.39; Rochester Comments at 28.

388 See, e.g., MFS Comments at 87-100; Teleport Comments at 53-56 (opposing, inter alia, trunk/loop price differentials); ICC Comments at 21-22; ICC Reply Comments at 3-5, 10-11; Teleport Denver Comments at 11, 13; Allnet Comments at 6; CompTel Comments at 19-22; AT&T Reply Comments at 8-10; MidAmerican Reply Comments at 6; WilTel Comments at 29; Sprint Reply Comments at 6-7.

developed sufficiently.[389] Some CAPs and IXCs also oppose geographic differentials in special access rates, saying that the Commission would be unable to determine the LECs' costs for services offered on a geographically disaggregated basis.[390] WilTel, arguing that LECs will not voluntarily use pricing flexibility to rationalize the distance sensitivity in their special access rate structures, supports United's cell density plan insofar as it addresses underlying cost differences directly.[391]

168. MCI states that special access rates grew out of charges developed on an individual case basis and have never been required to meet any cost showing other than that the rates as a whole cover fully distributed costs.[392] MCI argues that the Commission should require the LECs to base special access rates on total service long-run incremental cost (TS-LRIC) studies, which measure the LEC's cost of providing an entire service and prevent a service from receiving subsidies from other services.[393] Several IXCs say that special access is identical to dedicated transport and directly related to common transport, and argue that consistent pricing guidelines should be applied to all the services.[394]

169. Users advance similar concerns about LEC pricing flexibility, arguing that pricing flexibility not be permitted until expanded interconnection is in place and a degree of competition has developed.[395] Some users, however, support downward, but not upward, pricing flexibility, and individual customer arrangements analogous to those offered by AT&T in its Tariff 12, in locations where competitors are offering service using expanded interconnection arrangements.[396]

170. NTIA and Justice argue that additional LEC pricing flexibility is appropriate,[397] although Justice would permit such

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389 See, e.g., CompTel Supp. Reply Comments at 7-9; MCI Supp. Reply Comments at 5.

390 See, e.g., ICC Reply Comments at 5-7; MCI Supp. Reply Comments at 4-5.

391 WilTel Supp. Reply Comments at 12.

392 MCI Supp. Comments at 4-5.

393 MCI Supp. Comments at 3, 6-7.

394 See, e.g., WilTel Supp. Comments at 2.

395 See, e.g., Ad Hoc Comments at 33-35; Ad Hoc Reply Comments at 5-13; Bankers Comments at 18-19; ICA Comments at 18.

396 See, e.g., Ad Hoc Reply Comments at 12-13; Bankers Reply Comments at 12-17; GSA Comments at 16-17.

397 NTIA Reply Comments at 17.

flexibility only for trunk-side connections (central office to IXC POP and interoffice links) subject to competition. Justice specifically proposes separate price cap subindexes for the competitive trunk-side transmission elements and the less competitive loop-side transmission (customer premise to central office) and connection charge elements.[398] The SBA opposes granting LECs any pricing flexibility beyond that already permitted under the price cap rules.[399]

171. Most of the state commissions contend that premature relaxation of regulatory safeguards could stifle the development of competition. As a result, they argue that the LECs should only be given additional pricing flexibility when and where substantial competition has developed, and that the LECs should not be allowed to reduce rates for customers who are subject to CAP competition and increase rates in non-competitive markets.[400] Illinois, on the other hand, supports immediate LEC pricing flexibility to respond to special access competition.[401]

172. Discussion. As the provision of special access becomes more competitive, marketplace forces should drive prices closer to cost. Care must be exercised, however, in the regulation of LEC pricing during the period of transition from monopoly to competition. This is particularly true when certain LEC services are subject to much greater competitive pressure than others. Excessive constraints on LEC pricing and rate structure flexibility will deprive customers of the benefits of competition and give the new entrants false economic signals. At the same time, inadequate restrictions on LEC special access pricing and rate structure could permit competitive abuses, stifling competitive entry and placing excessive cost burdens on customers of less competitive services.

173. Under the existing price cap rules, the LECs already possess a certain degree of pricing and rate structure flexibility. They can change their rates subject to the constraints imposed by the price cap index, applicable pricing bands, and the requirement for an average variable cost showing for below band rate reductions. The rules also permit the LECs to institute volume and term discounts for special access, and to adjust the distance sensitivity of their rates.[402]

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398 Justice Reply Comments at 50-51, 53-56 (proposing, among other things, that when expanded interconnection becomes effective, the LECs should be allowed to deaverage rates of competitive trunk-side special access, both on a distance-sensitive and geographic basis, and supporting removal of downward limits on the price cap pricing bands for such services).

399 SBA Comments at 32-33.

400 See, e.g., Florida Comments at 14-15; New York Comments at 11-13; D.C. Reply Comments at 3-5.

401 Illinois Comments at 12-13.

402 See infra ¶¶ 199-203, 212-15.

174. The Part 69 rules, however, require rate averaging at the study area level.[403] Competitors entering the interstate access market have generally targeted areas where the economic cost of providing service is well below the LECs' averaged rates. At a minimum, we believe that, with mandatory expanded interconnection, the Tier 1 LECs should be allowed greater freedom to adjust their rates to reflect traffic-density-related cost differences.

175. The cost of providing special access services includes two basic elements: (1) the cost of the central office electronic equipment (and related overheads, including central office buildings); and (2) the cost of fiber optic or copper cable, rights of way, conduit, repeaters and other distance-sensitive items. Traffic density appears to be a very significant factor affecting the cost of both elements. The greater the number of channels carried by a given cable, fiber strand, or electronics unit, the lower the unit costs of the equipment.[404] Traffic density is greater, and costs lower, in most central city areas where large concentrations of high volume customers are located, than in most suburban or rural areas.[405] Similarly, traffic density is likely to be greater, and costs lower, on routes that involve greater traffic aggregation, such as routes to IXC POPs, than on most loop-side routes to individual users.[406]

176. Illinois, New York, and Massachusetts, states in which intrastate expanded interconnection arrangements already exist, have also granted the LECs certain pricing flexibility. In orders dating back to 1983, the Illinois Commerce Commission has permitted Illinois Bell to set rates for residential and business local exchange service, as well as Centrex and private line service, based on three density pricing zones: (1) downtown Chicago; (2) the remainder of Chicago and some of the contiguous suburbs; and (3) the rest of the state. Rates are averaged within each area but are lower

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403 47 C.F.R. § 69.3(e)(7). A study area generally consists of a telephone company's operating territory within a given state, although there are certain cases in which companies have multiple study areas in a state.

404 This is an example of the well-known phenomenon of decreasing costs, or economies of scale. See, e.g., 1 A. Kahn, Economics of Regulation: Principles and Institutions 124 (1970).

405 The greater reliance on copper transmission facilities in rural areas, with their significant distance sensitivity, also supports the conclusion that service is more costly to provide in rural areas with greater transmission distances. See United Comments at 16-21 & App. 3; United Reply Comments at 6-9; GTE Reply Comments at 33-37 & App. A.

406 Distance also affects the costs of fiber optic cable. Although the cost of fiber optic facilities is clearly less distance sensitive than copper transmission plant, fiber optic facilities do have a distance sensitive component. See infra ¶¶ 212-15, for a discussion of distance sensitivity issues.

in the more urban areas.[407] New York granted pricing flexibility in the same orders requiring expanded interconnection for special access and switched transport, respectively, permitting New York Telephone to offer individual case basis prices for access services subject to competition in wire centers where interconnectors are present, in response to customers' requests for proposals.[408] Massachusetts, in its Intra-LATA Competition order, permitted New England Telephone to lower prices for competitive services to an incremental price floor and to increase rates for inelastic services gradually.[409]

177. Retaining the current degree of pricing and rate structure flexibility would be consistent with our past determination that the price cap system gives the LECs sufficient freedom to reprice their services. Our past statements regarding price caps could not, however, have taken into account either current market conditions or the significantly increased potential for competition made possible by expanded interconnection. For example, in the financial district in southern Manhattan, CAPs already provide a substantial portion of all DS1 and DS3 special access circuits.[410] Although some parties suggest that we delay any increase in LEC special access pricing flexibility until competition has developed further, competition is already developing relatively rapidly in the urban markets and will only accelerate with the implementation of expanded interconnection. Thus, delay in providing LECs with any additional pricing flexibility appears unwarranted. This is particularly true with regard to the current study-area-wide rate averaging, which forces the LECs to price above cost in the urban areas where competition is most intense.

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407 Revenue Requirements and Rate Levels for the Illinois Bell Tel. Co. and its Successor Organizations Effective on the Date of Divestiture, Dockets 83-0005 and 83-0669, at 54-55, 74 (Ill. Commerce Comm'n, Dec. 21, 1983) (density zones for residential and business local exchange network access rates); Illinois Bell Tel. Co. Proposed Restructuring of Centrex Service, Docket 84-0111, at 6 (Ill. Commerce Comm'n, Sept. 12, 1984) (density zones for Centrex rates); Illinois Bell Tel. Co. Proposed New Calling Rate Plan, Dockets 85-0364 and 86-0022, at 13-14, 49-50 (Ill. Commerce Comm'n, June 25, 1986) (density zones for private line rates).

408 Regulatory Response to Competition, Opinion No. 89-12, Case 29469, at 28 (N.Y. PSC May 16, 1989); Pooling, Collocation and Access Rate Design, Opinion No. 92-13, Case 28425, at 65-66 (N.Y. PSC May 29, 1992).

409 Intra-LATA Competition, D.P.U. 1731 (Mass. Dept. Pub. Util., Oct. 18, 1985); New England Tel. & Tel. Co., D.P.U. 89-300 (Mass. Dept. Pub. Util., June 30, 1990). Unlike Illinois and New York, however, Massachusetts has continued to require New England Telephone to price its services on a geographically averaged basis.

410 NYNEX Reply Comments at 7 & n.11 (CAPs have over 40% of high capacity market in New York state, with higher market share in Manhattan south of 59th Street). See also USTA Reply Comments at 7-8 (asserting that Bell Atlantic provides only 56% of DS3 services in its operating areas).

178. Retention of study-area-wide rate averaging could create a pricing umbrella for the CAPs and deprive customers of the benefits of more vigorous competition. It could also undermine efficiency by preventing the LECs from competing effectively even when they are the low cost service provider. Handicapping the LECs in this fashion could also increase their competitive losses under expanded interconnection, bringing upward pressure to bear on LEC rates for less competitive services, including those used by residential customers.

179. We will therefore change our rules to expand the LECs' flexibility in responding to competition. In particular, we will allow LECs with operational expanded interconnection offerings to implement a system of traffic density-related rate zones to bring special access rates more in line with costs.[411] We will continue to require that rates for special access services subject to competition[412] be averaged within each zone, but we will permit rates for such services to differ between zones. Each LEC may establish a number of density pricing zones[413] within each existing study

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411 An expanded interconnection offering will be deemed to be operational for this purpose when an interconnector has taken the expanded interconnection cross-connect element. See supra ¶ 157 (definition of cross-connect element). We believe that this is a reasonable point for permitting implementation of additional LEC pricing flexibility since the interconnector will first become able to serve customers when they take the cross connect. Use of expanded interconnection under the interim expanded interconnection tariffs required to be filed by certain LECs, see infra ¶ 262, does not satisfy this requirement, however. LECs that voluntarily offer expanded interconnection in compliance with the standards adopted in this Order are eligible to implement the pricing flexibility measures we are adopting.

412 A service will be deemed subject to competition if interconnectors have provided service of that type over their own circuits using expanded interconnection. For this limited purpose, interconnector resale of LEC transmission services will not be considered to constitute competition. Under this definition, we deem DS1 and DS3 special access services to be subject to competition. LECs may, by an appropriate showing, demonstrate that additional special access services are subject to competition. We delegate authority to the Chief, Common Carrier Bureau to determine when LEC services are subject to competition for this purpose.

413 While we are not limiting the number of zones, we believe that the use of up to three pricing zones would allow the LECs ample opportunity to reflect cost differences among major metropolitan business districts, smaller cities and suburban areas, and rural areas. LECs seeking to establish more than three zones shall be subject to increased scrutiny and must carefully justify the number of zones proposed in their density pricing zone plan.

area, assigning each of their central offices to one of the zones.[414] In filing such a proposal, LECs are to make a showing that the assignment of central offices to each of the zones reflects cost-related characteristics, such as traffic density or some measure of traffic through each office.[415] Geographic contiguity may also be considered in order to reflect exchange area boundaries or communities of interest, but should be a less important factor.

180. The LECs are to file and obtain approval of their density pricing zone plans in advance of filing tariff changes implementing these measures.[416] The LECs should file illustrative tariff pages when they file their density pricing zone plans, but the illustrative tariffs need not reflect rate levels. LECs that file consolidated access tariffs for multiple study areas may also file consolidated density pricing tariff revisions applicable to all of their study areas that qualify for implementation of these measures.[417] The requirement for review of density pricing zone plans is not intended to cause delay in the implementation of LEC pricing flexibility, however, and plans that reflect the standards adopted herein will be processed expeditiously.[418] Once the pricing plans have been approved, the LECs may file implementing tariff revisions on 31 days

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414 Channel terminations and other special access services should be assigned to the central office to which they are connected for purposes of defining zones. Interoffice facilities between central offices in different zones should be assigned to the highest priced zone containing one of the central offices. We believe that this classification will be consistent with traffic density patterns and underlying costs. Thus, interoffice mileage charges for service between central offices in different zones shall be rated as if the interoffice facilities were entirely within the highest priced of the zones. If they wish, LECs may use larger units, such as exchange areas, rather than central offices, in creating this system of rate zones.

415 In classifying central offices, we require that the LECs consider factors such as the density of total interstate traffic, which should reflect cost patterns more accurately than a narrower segment of traffic, such as special access alone. We require LECs to develop a method to account for both special access capacity (for which traffic is generally not measured) and switched traffic (which is typically measured).

416 We delegate authority to the Chief, Common Carrier Bureau, to consider and rule upon LECs' density pricing zone plans.

417 Implementation of density pricing plans would still be limited to those study areas in which expanded interconnection is operational.

418 In order to facilitate early review of these plans, we urge the LECs wishing to implement density pricing zones to file their plans no later than the date for filing expanded interconnection tariffs.

notice.[419] We believe that this should permit adequate time for review of the tariffs in light of our requirement that the density pricing zone plans contain illustrative tariff pages. We will not hesitate, however, to extend the effective dates of tariffs that raise significant new issues that we have not addressed in our review of the density pricing zone plans.

181. We will use the framework of the existing price cap system to implement the density pricing zone system for price cap LECs. For such LECs, we will create new price cap subindexes to reflect the new rate zones for DS1, DS3, and any other special access services that may be deemed subject to competition. For example, for a LEC that creates three rate zones, we will create three new subindexes for DS1 services -- one each for the high, medium, and low density zones -- and three separate subindexes for DS3 services, one for each of the zones. The initial DS1 and DS3 subindexes for each of the zones would be set at the level of the pre-existing DS1 and DS3 subindexes, respectively.

182. The rate bands applicable to the new, separate subindexes would employ a 5% upper band, while using a lower band of 10%. Thus, under this system, a LEC could lower prices for DS1 services in the highest density zone by as much as 10% per year adjusted for the price cap index (PCI), and could raise prices for DS1 services in the lowest density zone by no more than 5% per year adjusted for the PCI,[420] without triggering any of the additional cost justification or advance notice requirements contained in the price cap rules.[421]

183. The weighted average for rates in all of the zones must continue to fall within the existing 5% overall pricing bands applicable to the existing DS1 and DS3 subindexes, as well as those pricing bands applicable to the other service categories within the special access basket. Thus, the LEC could not lower the weighted average of all DS1 rates by more than 5% per year adjusted for the PCI without additional cost justification.

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[419] In order to reduce administrative burdens and the potential that density zone tariffs could become effective prematurely, the LECs are not to file these tariff revisions more than 31 days before their interconnection offering becomes operational. See supra note 411. It shall be the responsibility of the LEC to extend the tariff effective dates as necessary to ensure that its density pricing zone tariff does not become effective before an interconnector has actually taken the expanded interconnection cross-connect element in the affected study area.

[420] As with all bands in the price cap system, compliance with these pricing bands will be determined based on the weighted average of the rates for LEC services included within each subindex.

[421] We are creating a similar system for LECs subject to the rate of return rules that implement expanded interconnection. In the case of such LECs, we will permit the rates for the same services in different zones to diverge by a maximum of 15% in the first year that these tariff revisions are in effect, 30% in the second year, and 45% in the third year.

184. We believe that the customer interest in increased access competition requires the Commission to give the LECs flexibility to price their special access services closer to cost in the manner we propose. Failure to change the current system of uneconomic rate averaging would seriously constrain access competition and potentially deprive customers of the attendant benefits. The safeguards that we are adopting will limit the magnitude of the rate differentials and introduce them gradually to avoid harming customers in higher cost areas. We will monitor this system closely, and we will review its application to both price cap and rate of return LECs in the autumn of 1995.[422] This will permit us to make any adjustments warranted by our initial experience with density pricing.

185. Although the Part 69 rules do not explicitly prohibit differential rates for loop-side and trunk-side special access, the Commission has rejected tariffs proposing such differentials on the grounds that they were not properly cost supported and discriminated between similarly situated customers.[423] As argued by Justice, greater traffic densities on trunk-side routes, and consequent cost differences, may justify differential prices for trunk-side and loop-side special access links. To a great extent, however, such differentials are already reflected in tariffed rates for special access services because most loop-side special access service is at the DS1 level or below, while most trunk-side service is at or above the DS1 level, and is therefore less costly on a per unit basis. Given the other pricing flexibility measures that we adopt today, we do not believe that this additional form of pricing flexibility is necessary or appropriate at present.

186. The LECs also request a number of other changes in our rules regarding special access pricing. For example, they ask that we broaden or eliminate the price cap bands for DS1 and DS3 services, eliminate the service bands within the special access basket, adopt expedited tariff review procedures, and permit them to offer individual case basis pricing arrangements in response to competitors' offerings. Although such actions would eliminate LEC pricing restrictions that are not imposed on their competitors, we decline to adopt these measures at present. The system of rate zones that we are authorizing is a major step toward allowing the LECs to price their services closer to cost and thus to respond more effectively to competition in low-cost areas. While we recognize that additional pricing flexibility may well be justified as competition develops, we believe the public interest is best served at this time by proceeding in a measured

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422 This will allow us to evaluate the results of these measures on the basis of three annual access tariff filings. This will give us a sufficient base of experience on which to review the results of density pricing, while permitting us to correct any problems that might develop before there is a potential for significant harm.

423 Investigation of Access and Divestiture Related Tariffs, 97 FCC 2d 1082, 1099-1103, 1252-59 (1984). See also Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 923-24, 926-32, 947 (1984).

fashion, reserving the question of broader pricing and rate structure flexibility for future proceedings.

2. Volume and Term Discounts

187. Notice. We stated that it may be appropriate to consider establishment of new guidelines for review of LEC rate structure responses to competition, such as volume discounts.[424]

188. Comments. Some IXCs argue that the LECs' existing pricing flexibility under price caps is excessive, and that the LECs are engaging in anti-competitive conduct such as unjustified volume and term discounts.[425] On May 27, 1992, MFS filed a lengthy ex parte alleging that LEC volume and term discounts and use of hubbing arrangements for high capacity special access services are not cost justified.[426] MFS also alleges that certain of these volume and term discounts are predatory and contends that they merely replace individual case basis pricing, which the Commission has rejected, as a means by which LECs discriminate among their customers. MFS argues that hubbing arrangements essentially offer large customers substantial discounts, by giving them inexpensive DS3 pricing for services provided over the same network facilities, and sold to other customers, as DS1 service.[427]

189. MFS alleges that the LECs are using volume and term discounts and hubbing arrangements to lock up the largest customers before expanded interconnection requirements take effect and prospective competitors have a chance to introduce their offerings. MFS also argues that volume and term discounts and hubbing arrangements unreasonably discriminate in favor of the largest IXCs and thus undermine interexchange competition.[428] In addition, MFS opposes LEC ratcheting of switched and special access traffic,[429] arguing that this undermines the potential for switched access competition.

190. MFS proposes restrictions on LEC pricing flexibility, including a prohibition on term discounts and "ratcheting" arrangements until

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424 Notice, 6 FCC Rcd at 3266, ¶ 45.

425 MCI Comments at 28-29; WilTel Reply Comments at 14; CompTel Reply Comments at 9-19 (arguing for separate caps on individual special access subelements and no upward pricing flexibility for subelement rates).

426 Hubbing allows a customer to interconnect high capacity services of different bandwidths through multiplexing. For instance, instead of using point-to-point DS1 services, a customer may achieve greater economies of scale by using a hubbing arrangement consisting of DS1 channel terminations, multiplexing, and DS3 interoffice transmission.

427 MFS Ex Parte at 2-3 (May 27, 1992).

428 Id. at 31.

429 See supra ¶ 105 (defining ratcheting).

expanded interconnection is in effect for both special access and switched transport. In the alternative, MFS proposes that the Commission give customers a "fresh look" opportunity, once expanded interconnection becomes effective, to terminate long-term commitments entered into with the LECs. In addition, MFS proposes that the Commission establish guidelines requiring that the LECs, on a going forward basis, cost justify term discounts over 10%, volume discounts over 20%, and hubbing discounts of any amount.[430] MFS argues, citing the LEC Price Cap Order, that the relief it seeks would be consistent with the Commission's intent in price caps that rates not be unreasonably discriminatory.[431]

191. The LECs contend that term and volume pricing plans existed before the initiation of this proceeding.[432] They contest MFS's allegations that LEC pricing of high capacity services is predatory and argue that MFS has not shown that prices are below incremental cost.[433] Ameritech argues that many discount arrangements were justified on the basis of fully distributed costs in filings before the Commission prior to price caps, while LEC compliance with the price cap rules has addressed the concerns of LEC competitors since that time.[434]

192. More specifically, the LECs argue that term discounts reflect the lower costs of long-term supply relationships with the assurance of fixed-cost recovery.[435] GTE contends that a "fresh look" period for term agreements is inappropriate; both parties to a term agreement derive benefits -- the customer gets a lower price and rate stability, while the carrier gets reductions in risk and administrative costs.[436] Ameritech

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430 MFS Ex Parte at 46-53 (May 27, 1992).

431 Id. at 27-29, 38-41.

432 See, e.g., Bell Atlantic Ex Parte at 1 (June 12, 1992); BellSouth Ex Parte at 4, 6 (June 15, 1992); NYNEX Ex Parte at 1 (June 12, 1992); SW Bell Ex Parte at 15-17 (June 12, 1992); U S West Ex Parte at 3-4 (June 19, 1992).

433 See, e.g., Bell Atlantic Ex Parte at 2 (June 12, 1992); Ameritech Ex Parte at 2 (June 12, 1992); BellSouth Ex Parte at 2 (June 15, 1992); SW Bell Ex Parte at 18-19 (June 12, 1992); United Ex Parte at 13 (June 15, 1992); Pacific Ex Parte at 2-3 (June 17, 1992); U S West Ex Parte at 5 (June 19, 1992).

434 Ameritech Ex Parte at 2 (June 12, 1992). See also GTE Ex Parte at 7 (June 15, 1992).

435 See, e.g., Bell Atlantic Ex Parte at 3 (June 12, 1992); Ameritech Ex Parte at 2 (June 12, 1992); U S West Ex Parte at 14-15 (June 19, 1992).

436 GTE Ex Parte at 30, 33 (June 15, 1992).

states that it allows customers to cancel term arrangements at any time by simply paying the charges that would have applied to a shorter term.[437]

193. The LECs also argue that volume discounts and hubbing arrangements in the pricing of high capacity services are the result of more efficient service configurations.[438] NYNEX and U S West contend that in arguing that DS3 services to an IXC POP should be priced no lower than DS1 point-to-point services, MFS ignores information demonstrating that transmission costs decline directly with increased volumes of DS3 circuits to a particular customer premises.[439] Pacific states that price reductions reflected the declining investment required to provision fiber optic facilities.[440] The LECs contend that hubbing arrangements reflect the economies of multiplexing concentrated traffic onto high capacity transmission facilities.[441] Pacific argues that without hubbing, large customers would simply bypass Pacific's network.[442]

194. According to the LECs, the Commission required ratcheting as a way of reconciling its rules that treat switched access transport and special access transport differently, even though they both are provided over the same facility.[443] The LECs argue that ratcheting allows more efficient use of the public network by permitting customers to make the most efficient use of the highest volume transport facility that suits their needs.[444]

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437 Ameritech Ex Parte at 2 (June 12, 1992). The LECs also contend that term plans were implemented in response to requests from customers who needed rate stability for planning and budgeting purposes. BellSouth Ex Parte at 6 (June 15, 1992); Bell Atlantic Ex Parte at 4 (June 12, 1992); United Ex Parte at 11 (June 15, 1992).

438 See, e.g., BellSouth Ex Parte at 2-3 (June 15, 1992); SW Bell Ex Parte at 35-36 (June 12, 1992); GTE Ex Parte at 14-17 (June 15, 1992).

439 NYNEX Ex Parte at 2 (June 12, 1992); U S West Ex Parte at 9-12 (June 19, 1992).

440 Pacific Ex Parte at 5 (June 17, 1992). United argues that discounts of up to 75.63% for 12 DS3s on a five-year term compared to a single DS3 on a month-to-month term may not be unreasonable. United Ex Parte at 13 (June 15, 1992).

441 See, e.g., Bell Atlantic Ex Parte at 3 (June 12, 1992); SW Bell Ex Parte at 35 (June 12, 1992); United Ex Parte at 4 (June 15, 1992).

442 Pacific Ex Parte at 11 (June 17, 1992).

443 See, e.g., Bell Atlantic Ex Parte at 3 (June 12, 1992); BellSouth Ex Parte at 5-6 (June 15, 1992); SW Bell Ex Parte at 26-30 (June 12, 1992).

444 See, e.g., Bell Atlantic Ex Parte at 3 (June 12, 1992); United Ex Parte at 8 (June 15, 1992); U S West Ex Parte at 7-8 (June 19, 1992). Pacific states that the importance of ratcheting is exaggerated and that only

195. The LECs' attack MFS's proposed restrictions on LEC discount pricing as totally arbitrary and unjustified. Bell Atlantic and Pacific specifically contend that MFS offers discounts that are substantially similar to those offered by the LECs.[445] Some of the LECs assert that MFS is really seeking reconsideration of the Commission's price cap orders.[446] SW Bell argues that MFS would require that the LECs, seeking to offer discounts beyond its proposed limits, provide exhaustive cost support that price caps were designed to eliminate.[447] GTE argues that when LECs modify their relative rates, they are doing precisely what price caps permit: adjusting rates to respond to market signals and achieve more efficient price relationships.[448] The LECs also argue that pricing flexibility is needed to permit customers to realize the benefits of competition.[449] According to Bell Atlantic, the higher the FCC forces the LECs to keep their prices, the greater the margins MFS can earn while still beating LEC prices.[450]

196. A number of commenters responded to the LECs' filings concerning volume and term discount arrangements. MFS argues that the LECs base their arguments on the false premise that high capacity special access is fully competitive, when LEC practices are actually having an anticompetitive effect on the interstate access market.[451] Bay Area Teleport argues that the LECs' willingness to leverage their monopoly power in the competitive marketplace makes symmetric regulation between LECs and CAPs inappropriate.[452] IDA argues that the Commission should review LEC discounting practices and establish guidelines to ensure that rates for high

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0.47% of its special access traffic was provided pursuant to tariff provisions for shared use. Pacific Ex Parte at 14 (June 17, 1992).

445 Bell Atlantic Ex Parte at 1-2 (June 12, 1992); Pacific Ex Parte at 6 (June 17, 1992).

446 See, e.g., Ameritech Ex Parte at 2 (June 12, 1992); Pacific Ex Parte at 1-2 (June 17, 1992); GTE Ex Parte at 24-26 (June 15, 1992).

447 SW Bell Ex Parte at 36 (June 12, 1992).

448 GTE Ex Parte at 26 (June 15, 1992). See also GTE Ex Parte at 1-5 (Sept. 4, 1992); U S West Ex Parte at 1-4 (Sept. 4, 1992).

449 See, e.g., SW Bell Ex Parte at 40 (June 12, 1992); U S West Ex Parte at 16-17 (June 19, 1992); GTE Ex Parte at 5 (June 15, 1992).

450 Bell Atlantic Ex Parte at 6 (June 12, 1992).

451 MFS Ex Parte at 3 (July 8, 1992).

452 Bay Area Teleport Ex Parte at 1 (July 1, 1992). See also Intermedia Ex Parte at 1 (Aug. 26, 1992) (supporting MFS's position); Electric Lightwave Ex Parte at 1-9 (Aug. 13, 1992) (alleging that LECs have gained unfair competitive advantages using volume and term discounts).

capacity special access services are reasonable.[453] MetroComm argues that the LECs' extraordinary discounts on high capacity special access services without reliable cost data constitutes a prima facie case for investigation by the Commission.[454] The Bankers support MFS's "fresh look" proposal, but argue that the Commission should not put any limits on discount arrangements.[455] In its comments, WilTel also proposes that the Commission require LECs to alter their rate structure for non-recurring charges so that no cancellation fees are charged to persons who terminate LEC service in order to take service provided using expanded interconnection.[456]

197. ALTS argues that the Commission should initiate a full investigation of LEC volume and term discounts as well as impose a moratorium on further discounts until central office collocation is achieved.[457] ALTS also argues that the Commission should suspend LEC termination liability provisions for a period of time after expanded interconnection becomes effective.[458]

198. Teleport also made an ex parte filing, alleging the existence of additional barriers to entry. First, it argues that LECs frequently apply discriminatory nonrecurring charges when customers terminate the use of LEC circuits and move the traffic to CAP facilities.[459] Second, Teleport argues that LECs are attempting to "lock up" the access market by charging high termination penalties to special access customers who seek to end long-term arrangements, or by pricing month-to-month services at very high rates relative to long-term arrangements to force customers to use long-term arrangements.[460]

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453 IDA Ex Parte at 6 (July 23, 1992).

454 MetroComm Ex Parte at 8 (July, 1992).

455 Bankers Ex Parte at 2, 3-4, 7 (July 2, 1992).

456 WilTel Comments at 28.

457 ALTS Ex Parte at 11-2 (Sept. 9, 1992).

458 Id. at 12-13.

459 Teleport Ex Parte at 2-3 (July 10, 1992).

460 Id. at 4. Teleport also argues that LECs should be required to change its Centrex pricing practices. According to Teleport, LECs currently charge Centrex customers for two channel terminations, even though the LECs only provide one, by treating the Centrex switch located within the LEC central office as if it were located at the user's premises. Teleport contends that if the LECs are permitted to continue imposing the second channel termination charge, Centrex users will pay a substantial penalty when purchasing a CAP-supplied link between the central office and IXC POP. Id. at 5-6.

199. Discussion. In its ex parte filing, MFS alleges that many LEC volume and term discounts, as well as hubbing and ratcheting arrangements, are unreasonable and discriminatory. The LECs counter these allegations at considerable length. We conclude that hubbing and ratcheting arrangements are reasonable means of permitting customers flexibility in structuring their leased special access networks, and allowing the LECs to engineer their access networks efficiently using higher capacity facilities.[461] We also conclude that reasonable volume and term discounts can be a useful and legitimate means of pricing special access services to recognize the efficiencies associated with larger volumes of traffic and the certainty of longer term deals.

200. The largest of the volume and term discounts cited by MFS, some of which may result in total discounts of more than 70%, however, may be anticompetitive or raise questions of discrimination. Although some of the LECs contend that their volume and term discounts are cost justified, the record before us now does not permit us to make definitive determinations concerning the lawfulness of specific discounts. In light of the growing emergence of access competition, we conclude that the largest of the discounts offered by the LECs warrant some additional inquiry to help us determine whether we should promulgate guidelines requiring cost justification of any subset of LEC volume and term discounts.[462] Accordingly, we direct the Chief, Common Carrier Bureau to require the submission of cost support data for some of the largest existing discounts.[463]

201. The existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to "lock up" the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment. To address this, we conclude

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461 The Commission mandated that the LECs continue to offer ratcheting. Investigation of Access and Divestiture Related Tariffs, 97 FCC 2d 1082, 1225, 1282 (1984).

462 For example, MFS cites the following LEC offerings: (1) Bell Atlantic -- 76% discount for optical DS3; (2) Pacific Bell -- 67% discount for electrical DS3; (3) Ameritech -- 66% discount for electrical DS3; and (4) U S West -- 66% discount for optical DS3. MFS Ex Parte, Exh. A at 2 (May 27, 1992).

463 This further examination of the largest existing LEC discounts reflects our commitment to guard against possible anticompetitive abuse under our current pricing rules. Contrary to the arguments of some parties, however, such possible abuse should not stand in the way of reforming our rules on LEC pricing by eliminating non-cost-based regulatory constraints with the implementation of expanded interconnection. See supra ¶¶ 172-86. This will permit LECs to respond to increasing market pressures through a combination of zone pricing differences and legitimate volume and term discounts. Our commitment to protect against anticompetitive pricing will remain under these new pricing rules.

that certain LEC customers with long-term access arrangements should be permitted to take a "fresh look" to determine if they wish to avail themselves of a competitive alternative.[464] This right will be limited to customers with LEC arrangements for terms in excess of three years entered into on or before the date of adoption of this Order.[465] The right to end a long-term arrangement at a specific central office will exist for a period of 90 days from the date the first expanded interconnection arrangement is operational in that central office.

202. If a party chooses to terminate a long-term arrangement within this period, the termination charge will be limited. Notwithstanding any termination charges provided in the applicable LEC tariffs, the LEC may not charge more than the difference between (1) the amount the customer has already paid and (2) any additional charges that the customer would have paid for service if the customer had taken a shorter term offering corresponding to the term actually used,[466] plus interest at the prime rate.[467] This termination procedure will allow special access customers with

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464 This does not give a LEC the right to cancel a long-term arrangement that a customer wishes to continue. Given that these measures will be applicable only to the IXCs and other large, sophisticated users, and the CAPs' incentive to bring this opportunity to the attention of potential customers, we do not believe that it is necessary to require customer notification by the LECs.

465 This will restrict the opportunity for a "fresh look" to customers who would otherwise be unable to seek a better deal for a significant period of time, and treat customers entering into long term arrangements with the LECs after adoption of this Order as having chosen to do so despite the impending competitive developments.

466 Ameritech states that it already has a similar policy for its long-term arrangements. Ameritech Ex Parte at 1 (June 12, 1992). For example, consider a customer who purchased DS3 services from a LEC for a 10 year term at $10,000 per year per channel, and then after 3 years of the term, competitive interconnected services became available. The LEC would have charged $12,000 per year for the same services for a 3 year term. In this case, the termination liability would be limited to the difference between what the customer would have paid under the shorter term ($12,000 x 3 years = $36,000) and what the customer actually paid ($10,000 x 3 years = $30,000). Thus, the LEC could not charge the customer more than $6,000 ($36,000 - $30,000 = $6,000), plus appropriate interest. When the actual service period does not precisely coincide with an existing service term, the charges for the service used are to be calculated at the rates applicable at the time the service term began, for the longest term commitment that the customer would have completed. The charge for the period beyond that term is to be calculated pro rata at the rates applicable to the completed term.

467 Interest rates are to be adjusted to reflect changes in the prime rate and will apply to the balances due under the recalculation as they would have accrued over time. This procedure is designed to put both the LEC and

long-term arrangements to select among competitive providers of access service, while ensuring that the LEC obtains the compensation appropriate for the term actually taken by the customer.[468]

203. We also conclude that non-recurring reconfiguration charges must be applied in a neutral manner that does not differentiate based on whether the customer chooses to use a CAP or LEC facilities for special access service unless there are specific, identifiable cost differences. Absent even-handed treatment, non-recurring reconfiguration charges could constitute a serious barrier to competitive entry.[469]

3. Distance Sensitivity

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the customer in the same position that they would have been in had the customer opted for a shorter term arrangement from the beginning of the service term.

[468] The Commission has adopted similar "fresh look" requirements in the past. See Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992) (Interexchange Reconsideration Order) ("fresh look" in context of 800 bundling with interexchange offerings). See also Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 4582, 4583-84 (1991) (Air-Ground Radiotelephone Service Reconsideration Order) ("fresh look" requirements imposed as condition of grant of Title III license). We believe that LEC termination charges in excess of those specified herein would, if allowed to continue, deprive customers of the benefits of competition and tend to "lock up" the interstate special access market. Therefore, we find that continuation of such termination provisions without the modifications specified herein would be unjust and unreasonable in violation of the Communications Act. Accordingly, we prescribe the termination measures described herein, including the maximum just and reasonable charges for the customers specified. Sections 201-205 of the Communications Act empower the Commission to adopt rules and regulations concerning the reasonableness of tariffed LEC offerings, including termination charge provisions. Moreover, the Commission may take this step consonant with Section 205 of the Act. The parties have been on notice, and have had full opportunity to comment, on our intent to examine "whether to establish new guidelines for review of rate structure responses to competition, such as volume discounts . . . ." Notice, 6 FCC Rcd at 3266, ¶ 45.

[469] We decline to address the Centrex pricing issue raised for the first time by Teleport in its July 10, 1992 ex parte filing. The pricing of interstate services configured using Centrex switches raises complex policy questions, and has traditionally been the subject of controversy over the years. As a result, we will not mandate any changes in access pricing for Centrex services when no other parties have addressed the issue. Teleport, of course, is free to raise this issue in another context.

204. Notice. In a supplemental notice, we requested comments on distance sensitivity in the LECs' special access rates.[470]

205. Comments. CompTel and other non-dominant IXCs allege that there is far more distance sensitivity in LEC special access rates than is justified by costs, and that there are unwarranted differences in the degree of distance sensitivity in rates for various services.[471] They argue that excessive distance sensitivity raises transmission costs for non-dominant IXCs, gives IXCs and CAPs incentives to make inefficient network investments, and gives AT&T discriminatory competitive advantages.[472] The non-dominant IXCs ask the Commission to require that all LEC special access rates be no more distance sensitive than DS3, the least distance sensitive service.[473]

206. Sprint asks that the Commission require the BOCs to identify the equipment costs recovered by the various DS3 rate elements so that the inconsistencies in the BOCs' allocation and recovery of interoffice transmission costs can be explained, and if unjustified, remedied.[474] MCI asserts that total service long-run incremental cost (TS-LRIC) studies should be the basis of any distance sensitivity in the LECs' special access rate structures.[475] MCI argues that non-direct costs, including common costs, subsidies and unamortized historical costs, should be allocated equally among special access links, and not in proportion to direct costs, since the latter would result in an unfair over-allocation of such costs to IXCs with longer links that have higher direct costs.[476]

207. The CAPs argue that existing LEC pricing flexibility under price caps enables LECs to manipulate the prices of distance sensitive rate elements strategically, depending on whether they face competition from CAPs in given areas.[477] MFS, ALTS and Teleport propose that the Commission reduce the amount of pricing flexibility that LECs now have under price caps by

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470 Expanded Interconnection with Local Telephone Company Facilities, Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5809 (1991).

471 CompTel Supp. Comments at 6-10; CompTel Supp. Reply Comments at 4-6 & App. A; WilTel Supp. Comments at 5-12; WilTel Supp. Reply Comments at 5-8; Sprint Supp. Comments at 2-4.

472 CompTel Supp. Comments at 10-12; MCI Supp. Comments at 3-4; WilTel Supp. Comments at 16-24.

473 CompTel Supp. Comments at 12-14; WilTel Supp. Comments at 15.

474 Sprint Supp. Comments at 7.

475 MCI Supp. Comments at 3, 6. See supra ¶ 168.

476 MCI Supp. Comments at 8-9 n.16.

477 MFS Supp. Comments at 2-5; ALTS Supp. Comments at 3-4; Teleport Supp. Comments at 3.

establishing separate subindexes for the distance sensitive rate elements in their special access rates.[478] They submit that the Commission should require the LECs to reflect the distance-sensitive component of their transport rates in a separate, uniform rate element, such as a uniform rate per mile, and to demonstrate that the rate structure is cost justified.[479] Teleport Denver argues that distance-insensitive and traffic-sensitive special access rates would facilitate network efficiencies, discourage cross-subsidization, promote reliability, and facilitate interexchange and local access competition.[480]

208. The Tier 1 LECs respond that distance continues to be a significant factor affecting the cost of special access facilities, and that even the cost of fiber facilities is distance sensitive.[481] They argue that there is no need for the Commission to take any action restraining LECs' special access pricing, that the degree of distance sensitivity in their special access rates is cost-justified, and that competitors' calls for additional cost studies or justification constitute nothing more than an attempt to place additional regulatory burdens on them and to reargue the merits of price caps.[482] Although they admit that fiber facilities are less distance sensitive than copper facilities, the LECs state that their rates are distance sensitive in part because they are based on study area-wide averaged rates that include the embedded cost of copper-based facilities.[483] GTE states that costs are not distributed evenly per mile, but are "lumpy."[484] In addition, several of the LECs contend that there is no basis

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478 MFS Supp. Comments at 11; ALTS Supp. Comments at 5-6; Teleport Supp. Comments at 4.

479 MFS Supp. Comments at 6-10; Teleport Supp. Comments at 4; ALTS Supp. Comments at 4-5.

480 Teleport Denver Supp. Comments at 2-7; Teleport Denver Supp. Reply Comments at 3-5.

481 Ameritech Supp. Comments at 3-4; Centel Supp. Comments at 2-4; Cincinnati Bell Supp. Comments at 2-4; GTE Supp. Reply Comments at 2-6; NYNEX Supp. Comments at 2-4; Rochester Supp. Comments at 4; SW Bell Supp. Comments at 2-3; USTA Supp. Comments at 2; U S West Supp. Comments at 5-7.

482 Bell Atlantic Supp. Comments at 1-3; BellSouth Supp. Comments at 3-4; Centel Supp. Comments at 5; NYNEX Supp. Comments at 5; USTA Supp. Comments at 1; Ameritech Supp. Reply Comments at 4-7; BellSouth Supp. Reply Comments at 5-6; GTE Supp. Reply Comments at 14-17; Pacific Supp. Reply Comments at 23-30; U S West Supp. Reply Comments at 6-7.

483 Centel Supp. Comments at 3-4; NYNEX Supp. Comments at 2-3; Pacific Supp. Comments at 4-5; SNET Supp. Comments at 2; SW Bell Supp. Comments at 3-5; GTE Supp. Reply Comments at 6-8.

484 GTE Supp. Reply Comments at 3.

for a uniform degree of distance sensitivity among LECs or between different types of transmission services.[485]

209. The LECs assert that when expanded interconnection for special access is implemented, they will be unable to overstate the distance sensitive cost of channel mileage because CAPs and IXCs will be able to install alternative transmission facilities to the LECs' central offices.[486] The LECs counter the argument about the impact on interexchange competition, contending that distance sensitivity is cost justified and therefore in the public interest even if distance sensitive rates affect the IXCs differently. They assert that an artificial rate structure shielding less efficient providers would deny consumers the benefit of AT&T's network efficiencies.[487] Finally, the LECs argue that the Commission should adhere to price cap principles and grant the LECs additional pricing flexibility in order to compete.[488]

210. GSA agrees with the IXCs' and CAPs' argument that excessively distance sensitive transport rates have a negative impact on both local access competition and interexchange competition. It supports requiring LECs to cost justify the level of distance sensitivity in their rates.[489] Small LECs, on the other hand, submit that they should be allowed to retain distance sensitivity in their special access rate structures. They argue that LECs' interoffice facilities vary widely based on individual company

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485 USTA Supp. Comments at 2; U S West Supp. Comments at 5-7; Rochester Supp. Reply Comments at 3-5; NECA Supp. Comments at 2-3.

486 BellSouth Supp. Comments at 4; GTE Supp. Reply Comments at 13; NYNEX Supp. Comments at 4-5; Rochester Supp. Reply Comments at 2-3; SW Bell Supp. Comments at 11-12.

487 Ameritech Supp. Comments at 9-10; BellSouth Supp. Comments at 4-5; SW Bell Supp. Comments at 9; USTA Supp. Comments at 3.

488 Ameritech Supp. Comments at 5; Ameritech Supp. Reply Comments at 8-11; Bell Atlantic Supp. Comments at 2; GTE Supp. Comments at 4-6; GTE Supp. Reply Comments at 12-13; NYNEX Supp. Reply Comments at 6-11; SW Bell Supp. Comments at 11, 14; SW Bell Supp. Reply Comments at 11-12; Pacific Supp. Comments at 6-10. See also USTA Supp. Comments at 1-2, 4 (LECs are voluntarily reducing distance sensitivity in their access rates); Pacific Supp. Comments at 5 (same); United Supp. Comments at 2-3 (distance is a less important cost driver as volume or density increases); Consolidated Supp. Comments at 2-3 (same); Ameritech Supp. Comments at 7-8 (CompTel's analysis is flawed, as rates for various types of switched and special access increase only by factors of 1.5 to 2.5 as distance increases from one to fifty miles); NYNEX Supp. Reply Comments at 3-5 (CompTel demonstrates only the cost efficiencies of high capacity transmission, and not relative distance sensitivity); U S West Supp. Comments at 4; U S West Supp. Reply Comments at 3-4 (LEC channel termination rates should contain distance sensitivity).

489 GSA Supp. Reply Comments at 3-9.

circumstances, that most NECA pool members do not have any fiber optic facilities, and that a non-distance sensitive rate structure would provide uneconomic incentives for IXCs to reduce the number of POPs, which could result in stranded investment.[490]

211. California asserts that at least in California, the distance sensitivity of LECs' intrastate rates for transport and special access are cost-supported and non-discriminatory.[491] D.C. supports the use of distance-sensitive charges and differential pricing based on routing.[492]

212. Discussion. Based on the current record, we see no reason to restrict, as a general proposition, the degree of distance sensitivity in LEC rates for different special access services. Various special access services -- and various LECs -- use different mixes of copper and fiber optic plant, which have different cost characteristics insofar as distance sensitivity is concerned. Given the underlying cost characteristics, it is not surprising that there are differences in the distance sensitivity of rates for different services and differences in the distance sensitivity of comparable service offerings by different LECs. In addition, we concluded in the LEC Price Cap Order[493] that allowing the LECs a degree of pricing flexibility would foster efficiency.

213. We do not believe that the record supports CompTel's proposal to require that LEC rates for all special access service categories be no more distance sensitive than DS3, the least distance sensitive special access service. In fact, it appears that rates for other services can reasonably reflect greater distance sensitivity than the charges for DS3. DS3 is provided almost exclusively over fiber optic facilities, for which the cost is substantially less distance sensitive than copper cable. DS1 and lower capacity services, however, are often provided over copper facilities. Given the averaging of LEC rates, it is reasonable to expect that rates for these services would often be more distance sensitive than those for DS3.

214. The importance of distance sensitivity also appears to be declining, since certain of the LECs are reducing the degree of distance sensitivity in their rate structures as the proportion of fiber

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490 NECA Supp. Comments at 2-3; NTCA Supp. Reply Comments at 3-5; Consolidated Supp. Comments at 1-4.

491 California Supp. Comments at 2.

492 D.C. Comments at 2-3.

493 Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786 (1990), recon., 6 FCC Rcd 2637 (1991), further recon., 6 FCC Rcd 4524 (1991), second further recon., 7 FCC Rcd 5235 (1992), pet. for review pending sub nom. National Rural Telecom Ass'n v. FCC, No. 91-1300 (D.C. Cir., filed June 26, 1991).

increases.[494] Competitive pressures should also tend to bring the distance sensitivity of rates in line with costs. For example, under expanded interconnection, IXCs will be able to avoid excessively distance sensitive LEC rates by taking service from CAPs or by taking advantage of expanded interconnection themselves.[495]

215. In light of these facts, we conclude that it would not be in the public interest to mandate the degree of distance sensitivity that LEC special access rates should reflect, and we decline to do so.

VIII. OTHER ISSUES

A. Legal Authority

216. Notice. We tentatively concluded that we have legal authority to implement expanded interconnection under Section 201 of the Communications Act.[496] Section 201 requires common carriers to provide service upon reasonable request, mandates that terms and conditions be just and reasonable, and authorizes the Commission to order interconnection in the public interest. We also tentatively concluded that Sections 201-205 of the Act[497] provide us with authority to adopt rate structure and pricing policies for expanded interconnection.[498]

217. Comments. A number of the LECs contend that the Commission lacks authority to mandate expanded interconnection for interstate special access. They argue that the Section 201(a) requirement that common carriers provide service "upon reasonable request" does not authorize the Commission to require a LEC to offer a service that the carrier has not chosen to provide.[499] U S West and Pacific assert that the "interconnection" for through routes referred to in Section 201(a) differs from the form of interconnection contemplated in this proceeding.[500] Ameritech argues that the Commission does not have authority to order interconnection with competing

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494 USTA Supp. Comments at 1-2, 4; Pacific Supp. Comments at 5.

495 Finally, the zone density pricing approach will allow LECs greater flexibility to have the greatest distance sensitivity in those areas where costs most warrant distance-sensitive pricing.

496 47 U.S.C. § 201.

497 47 U.S.C. §§ 201-205.

498 Notice, 6 FCC Rcd at 3269-70, ¶ 69.

499 See, e.g., BellSouth Comments at 44-45; Pacific Comments at 88. See also Ameritech Reply Comments, App. A at 1-6.

500 U S West Comments at 55; Pacific Comments at 88.

local carriers.[501] U S West, Pacific and Ameritech contend that the Communications Act does not give the Commission authority to order interconnection with noncarriers,[502] although U S West and Pacific acknowledge that the Act authorizes the Commission to mandate expanded interconnection with other carriers.[503] U S West argues further that if we rely on Section 201(a) to mandate interconnection, the requirement must be confined to carriers and that if we mandate interconnection universally, we must rely on the sections of the Act concerning prescription of service offerings and mandating of facilities.[504] NYNEX does not dispute the Commission's authority to order interconnection, but states that we must find that interconnection is in the public interest, not just that it will enhance competition, and that LECs must have an opportunity to earn a return on their investment.[505]

218. The CAPs and users submit that the Commission has ample authority to order expanded interconnection as proposed in the Notice, as well as the terms and conditions of such interconnection.[506] FMR contends that Sections 1 and 201 of the Act authorize the Commission to order expanded interconnection and that Sections 202 and 205 authorize adoption of the rate structures and other terms proposed in the Notice.[507] MFS argues that Section 205 gives the Commission power to prescribe terms and conditions for end user access.[508] Justice and WilTel contend that the Commission has legal authority under Section 201(a) to order physical collocation,[509] while the SBA argues that LEC refusal to interconnect with CAPs may violate the Sherman Antitrust Act's "essential facilities" doctrine.[510] MFS also disputes U S West's suggestion that the Commission has not established the necessary

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501 Ameritech Reply Comments, App. A at 1-6.

502 U S West Comments at 54-55; Pacific Comments at 88; Ameritech Reply Comments, App. A at 3-5.

503 U S West Comments at 54; Pacific Comments at 88.

504 U S West Comments at 54 (citing Sections 203 and 205 of the Act regarding tariff rules and Section 214(d) regarding service provisioning).

505 NYNEX Comments at 72-73.

506 MFS Comments at 21; MFS Reply Comments at 27; Teleport Denver Comments at 15-16; FMR Comments at 19-26; GSA Comments at 22.

507 FMR Comments at 19-26.

508 MFS Reply Comments at 27.

509 Justice Reply Comments at 40-42; WilTel Reply Comments at 7-8. See also MCI Reply Comments at 79-85.

510 SBA Comments at 5 & n.6.

prerequisites to act under Sections 203, 205, and 214(d).[511] Similarly, the Bankers argue that U S West's interpretation of the Act "is predicated upon an untenably narrow reading of Sections 201, 202, and 203 and is unsupported by case law."[512]

219. Discussion. We conclude that the Commission has legal authority, pursuant to Sections 1, 4(i), 201, 202, 205, and 214(d) of the Communications Act, to require that the Tier 1 LECs implement expanded interconnection for interstate special access under the terms and conditions adopted in this Order. We also find ample legal authority in these sections of the Act for the rate structure and pricing measures that we prescribe today.

220. Section 201(a) authorizes the Commission, where necessary or desirable in the public interest, to order common carriers to establish physical connections with other carriers.[513] Contrary to the arguments of certain LECs, this language authorizes the Commission to require that the LECs provide interstate expanded interconnection service to carriers even though they might not do so voluntarily.[514] After thorough analysis of the record in this proceeding, we have concluded that the provision of expanded interconnection for special access by Tier 1 LECs will produce substantial public interest benefits by removing unnecessary barriers to increased competition.[515] LECs are "common carriers," physical and virtual collocation are forms of "physical connection," and the IXCs and most CAPs are "carriers." Thus, we have authority to order expanded interconnection for common carriers pursuant to this portion of Section 201(a).

221. Our authority to order the Tier 1 LECs to provide expanded interconnection for special access to customers that are not carriers flows from the language in Section 201(a) requiring that common carriers furnish communication service upon reasonable request and the Section 201(b) requirement that all charges, terms and conditions for service be just and reasonable. Given that the LECs will be obligated to provide expanded interconnection service to carriers, we believe that it would be unjust and

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511 MFS Reply Comments at 27.

512 Bankers Reply Comments at 6-7 & n.17.

513 47 U.S.C. § 201(a).

514 See Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092, 1103-06 (D.C. Cir. 1981). In Lincoln, the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's order requiring that Lincoln provide interconnection facilities to MCI over Lincoln's objections. The court explained that "under Section 201(a) . . . interconnections may be ordered by the Commission . . . after an affirmative public interest finding" and concluded that the Commission properly found interconnection to be in the public interest. Id.

515 See supra ¶¶ 13-18.

unreasonable for them to deny end user requests for expanded interconnection. This conclusion also is supported by the nondiscrimination provisions of the Act.[516]

222. Furthermore, it is established Commission policy not to distinguish between different types of customers in the access charge context. In the Access Charge proceeding,[517] for example, we required exchange carriers to develop charges that reflect actual usage of local exchange service by "all customers, regardless of their designation as OCC [other common carrier], enhanced service provider, or privately owned or leased system."[518] In interpreting this language, we stated that our purpose was to "eliminate so far as possible differences in services and rates based on whether the customer is a carrier or end user . . . [because] end users should be able to obtain access services offered to ICs [interexchange carriers] if they wish, in addition to services expressly reserved for end users."[519] The same rationale applies here because there is no sound reason to distinguish among potential customers of expanded interconnection services.

223. Section 205(a) of the Act also gives the Commission authority to order the LECs to provide expanded interconnection and to implement a new rate structure and pricing rules for expanded interconnection.[520] As noted earlier, the LECs' current special access tariffs make it economically infeasible for customers to combine their own or CAP facilities with portions

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516 Section 202(a) states that "It shall be unlawful for any common carrier to . . . subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).

517 MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983) (Access Charge Order), mod. on recon., 97 FCC 2d 682 (1983) (Access Charge First Reconsideration Order); 97 FCC 2d 834 (1984) (Access Charge Further Reconsideration Order).

518 Access Charge First Reconsideration Order, 97 FCC 2d at 722. Private systems would typically be classified as end users.

519 Investigation of Access and Divestiture Related Tariffs, 97 FCC 2d 1082, 1187 (1984), citing Access Charge First Reconsideration Order, 97 FCC 2d at 722. See also Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 931-32 (1984) ("rates and terms for use of a transmission service should not depend on the type of use or customer").

520 Section 205(a) provides that "Whenever . . . any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair and reasonable." 47 U.S.C. § 205(a).

of the LEC network to satisfy their special access needs.[521] As a result, the current access tariff structure represents a barrier to the further development of special access competition. In light of our finding that the provision of expanded interconnection by Tier 1 LECs would produce substantial public interest benefits,[522] we conclude that continuation of the current special access rate structure by the Tier 1 LECs would be unjust and unreasonable in violation of Section 201(b) of the Act.[523]

224. Once we find that a rate, classification or practice violates the Act, Section 205(a) permits us, after full hearing,[524] "to determine and prescribe" the "just, fair and reasonable" rate, classification or practice to be followed in the future.[525] We believe that the expanded interconnection requirements and the new rate structure and pricing rules adopted today are "just, fair, and reasonable" for the reasons discussed in the prior sections of this Order. Thus, Section 205(a) authorizes us to prescribe the expanded interconnection architecture, standards, rate structure and pricing rules adopted in this Order.[526] Section 214(d) also gives us authority to require Tier 1 LECs to provide expanded interconnection.[527]

225. Sections 201 and 205 also provide the Commission with authority to permit Tier 1 LECs to implement a system of density pricing zones once expanded interconnection is operational in a given study area. We believe that our current requirement for study-area-wide special access rate averaging is no longer just and reasonable in the more competitive

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521 See supra ¶ 4. See also supra ¶ 5.

522 See supra ¶¶ 13-18.

523 We have specifically found that non-Tier 1 LECs should not be required to provide expanded interconnection at this time. See supra ¶¶ 56-57. Therefore, continuation of the existing special access rate structure by these carriers would not constitute a violation of the Act.

524 A notice and comment rulemaking proceeding fulfills this requirement. United States v. Florida East Coast Railway Co., 410 U.S. 224, 238-46 (1973).

525 47 U.S.C. § 205(a).

526 This approach is consistent with our action in the Access Charge proceeding. See supra note 517. In the Access Charge Order, we established rules to govern the calculation of the rates IXCs and end users would pay for use of local telephone company access facilities. 93 FCC 2d at 245-46. In relying on Section 205(a), we reasoned, "[a]lthough the rules we are adopting will not establish the precise charge for most access elements, we are establishing many of the steps that carriers must follow in order to compute access charges. Our Section 205(a) power to prescribe charges includes the power to prescribe steps in the computation of charges." Id. at 256.

527 47 U.S.C. § 214(d).

environment resulting from expanded interconnection. Accordingly, we modify this requirement with respect to rates for competitive special access services. Based on our review of the record, we believe that permitting Tier 1 LECs to implement the system of density pricing zones adopted in this Order will be just, fair and reasonable. This conclusion in no way undermines the Commission's commitment to geographic averaging of AT&T's interstate MTS rates.

226. Sections 1 and 4(i) of the Act provide further authority for the actions we take today concerning the implementation of expanded interconnection for special access and density pricing zones for LEC special access. Specifically, Section 1 states that the purpose of the Commission is to regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[528] Section 4(i)[529] authorizes the Commission to take whatever action is necessary to meet its statutory responsibilities. These provisions give the Commission broad authority to regulate telecommunications in the public interest.[530]

B. Fifth Amendment Issues

227. Notice. We stated that in light of the compensation proposed for LEC provision of expanded interconnection, we did not believe that our interconnection proposals raised questions of a taking without just compensation.[531]

228. Comments. A number of the LECs argue that mandated physical collocation would constitute an unlawful taking in violation of the Fifth

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528 47 U.S.C. § 151.

529 47 U.S.C. § 154(i).

530 See, e.g., New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1104, 1106-09 (D.C. Cir. 1987) ("Commission properly exercised its authority under Section 4(i) to remedy the [rate-of-return prescription] violation by ordering rate reductions"), cert. denied, 109 S. Ct. 1942 (1989); Lincoln Tel. & Tel. Co., 659 F.2d at 1107-08 ("under Section 154(i) . . . the Commission had authority to establish . . . an interim collection system"); Nader v. FCC, 520 F.2d 182, 203-04 (D.C. Cir. 1978) ("Commission's . . . order prescribing AT&T's rate of return was in the public interest, necessary for the Commission to carry out its functions in an expeditious manner, and within its Section 4(i) authority"); Access Charge Order, 93 FCC 2d at 258-59 ("Congress has conferred broad powers upon this Commission in Section 4(i) . . . [t]hose powers would be sufficient to enable us to adopt the access charge rules we are adopting").

531 Notice, 6 FCC Rcd at 3269-70, ¶ 6, n.58.

Amendment of the United States Constitution.[532] These LECs generally contend that: (1) mandatory physical collocation would constitute a taking of property; (2) just compensation would therefore be required; (3) only courts, not regulatory agencies, can determine just compensation for constitutional purposes; (4) the Commission lacks authority to effect such a taking under the Communications Act; and (5) such a taking would be unlawful if carried out for a private purpose, such as to benefit the CAPs, rather than for a public purpose.

229. Justice, the CAPs, Ad Hoc and WilTel argue that mandatory physical collocation would not constitute a taking under the Fifth Amendment.[533] Justice specifically argues that case law treating a permanent physical occupation of the landowner's property as a "taking," even if the space occupied is de minimis, does not appear to be applicable to interconnection between common carriers in the regulated public utility context. Justice adds that this case law is not intended to work a substantial change in settled principles of public utility regulation.[534]

230. Discussion. The purpose of the Fifth Amendment is to ensure that the government compensates owners for use of their private property.[535]

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532 The Fifth Amendment provides that, "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. Thus, when the government takes private property for public use, it may avoid a constitutional violation by ensuring that the property owner receives just compensation.

533 MFS argues that physical collocation is incidental to physical interconnections under Section 201(a) and that Section 201(a) demonstrates a clear Congressional intent that the Commission regulate the physical terms of interconnection between carriers. MFS Comments at 21-22, 72-73 & n.94; MFS Reply Comments at 44-45. MFS also believes that physical collocation would not violate the Fifth Amendment as long as just compensation is prescribed for use of the property. MFS Comments at 22. Ad Hoc contends that mandatory physical collocation would not constitute a Fifth Amendment taking because it "(i) advances legitimate state interests, (ii) does not deny the LEC economically viable use of its property, (iii) does not represent a permanent physical occupation, and (iv) will be undertaken with the acquiescence of the property owner who voluntarily submitted to regulation in return for certification as a common carrier." Ad Hoc Reply Comments at 25-26. Ad Hoc also argues that even if physical collocation were a taking, the LECs would receive just compensation. Id. See also Ad Hoc Comments at 22-23. WilTel argues that because the occupation of LEC property would be for a public purpose and the LECs would be compensated for the use, a physical collocation requirement would not raise a Fifth Amendment takings issue. WilTel Reply Comments at 8.

534 Justice Reply Comments at 41.

535 Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-24, reh'g denied, 439 U.S. 883 (1978).

We believe that giving interconnectors a right to mandatory physical collocation does not violate the Fifth Amendment because it is not a taking. Even if it is a taking, the requirement does not violate the Fifth Amendment because: (1) we have authority to engage in takings; (2) the taking would be for a public purpose; and (3) we provide a mechanism for Tier 1 LECs to receive just compensation for use of their property.

231. The Physical Collocation Requirement Is Not a Taking. We believe that the expanded interconnection architecture that we implement today involving physical use of LEC central office space is not a taking under the Fifth Amendment, but rather lawful governmental public utility regulation. Courts use a facts and circumstances test to determine what constitutes a Fifth Amendment taking and focus on three principal factors: (1) the character of the governmental action; (2) the regulation's interference with investment-backed expectations; and (3) its economic impact.[536] Any single factor may determine whether there is or is not a taking.[537] In applying these factors, courts have found two limited types of regulations to be takings with little or no additional factual inquiry: (1) those that result in a permanent physical occupation;[538] and (2) those that result in a total economic deprivation of property.[539]

232. Despite the position of some parties in this proceeding, we do not believe that giving interconnectors a right to physical collocation is a per se taking under Loretto v. Teleprompter Manhattan CATV.[540] In Loretto, the New York State Commission on Cable Television required landlords to permit cable television operators to install cable on apartment buildings for a one-time $1.00 fee set by the Commission. The Court held that the physical occupation constituted a per se Fifth Amendment taking.[541] We believe, however, that Loretto differs from our collocation requirement in several

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536 See Penn Central, 438 U.S. at 123-24. See also Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

537 See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (Court held no taking based only on degree of interference with investment-backed expectations because it found that factor alone to be "so overwhelming . . . that it disposes of the taking question").

538 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982) (permanent physical occupation is a taking without consideration of other factors). See also Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992) (a permanent physical occupation "generally requires compensation").

539 See Lucas, 112 S. Ct. at 2893-95, 2899-2902 (1992) (zoning regulation that caused total economic deprivation of residential coastal property was a taking, unless the state could demonstrate that the proposed use already was prohibited under state property or nuisance law).

540 458 U.S. 419 (1982).

541 Id. at 426.

important ways and that it is not the proper paradigm for evaluating the constitutionality of the regulation.

233. First, the governmental action in Loretto was very different from that here. Our authority to order physical collocation derives from our jurisdiction over interstate common carriers and our specific statutory mandate under Section 201(a) to order common carriers to provide physical interconnections in the public interest. Any per se rule, including the Loretto per se rule, is not reasonably applicable to a regulation covering public utility property owned by an interstate common carrier subject to the specific jurisdiction of this agency.[542]

234. In addition, although the Loretto Court announced a per se rule regarding permanent physical occupations, it identified several factors that comprise the rights of a property owner.[543] In light of those factors, our action in this case is significantly less intrusive than that in Loretto; we have carefully designed terms and conditions governing the physical

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542 We agree with the Department of Justice that Loretto does not appear to apply to necessary interconnection in the regulated public utility context. Justice Reply Comments at 41.

543 These factors include the right to: (1) possess the property oneself; (2) control the timing, extent and nature of an invasion; (3) exclude an occupier from possession and use; (4) control actual use of the property; (5) obtain a profit from the property; (6) avoid adverse effect on the sale or transfer of the property; (7) prevent invasion and occupation by a stranger; and (8) be free from a third party's complete dominion over the property. Loretto, 458 U.S. at 435-37.

collocation requirement so as to be as non-intrusive as possible[544] while at the same time creating the environment most conducive to competition.

235. Thus, the appropriate analysis of our physical collocation requirement is the three factor test, without operation of the Loretto per se rule. Looking first at the nature of the governmental action, we find that the physical collocation requirement is a legitimate exercise of our authority under the Communications Act to regulate interstate common carriers. Section 201(a) authorizes us to order carriers to provide physical interconnections in the public interest,[545] which necessarily empowers us to determine the most reasonable means for implementing interconnections. Physical collocation is a reasonable means of implementation for two simple reasons. First, technically, the equipment only can be housed in a LEC central office; and second, to prevent the potential for anticompetitive conduct by the LECs and foster achievement of the benefits of expanded interconnection, it is necessary to provide interconnectors access to that equipment. Thus, we are merely directing common carriers to use their lawfully regulated property in a manner that benefits the public.[546]

236. The second factor in a takings inquiry is an owner's reasonable investment-backed expectation concerning its property. Given

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544 For example, Tier 1 LECs will have some control over the use of central office space by both fiber optic and microwave interconnectors. They will be entitled to designate, within reason, the specific space within or upon their central offices in which to house interconnector equipment, and will not have to surrender any central office space currently in use or reserved for future use. By contrast, the landlords affected by the cable ordinance covered by Loretto apparently had no control over the location of the television cable. In addition, Tier 1 LECs will be able to negotiate reasonable terms for interconnector entry onto LEC property, including access to rooftop facilities in the case of microwave interconnection. Tier 1 LECs and interconnectors will jointly negotiate security arrangements to govern entry into the LEC building. Finally, Tier 1 LECs can seek to negotiate virtual collocation arrangements, and we have provided for exemptions from the physical collocation requirement in certain circumstances. The landlord in Loretto had no such flexibility.

We also note that Loretto's per se physical occupation rule has limited applicability. "Our holding today is very narrow." Loretto, 458 U.S. at 441. See also FCC v. Florida Power Corp., 480 U.S. 245, 251 (1987) ("We characterized our holding in Loretto as 'very narrow'); Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (Court did not apply the Loretto per se test where the state required a landowner to convey an easement across the property in return for a building permit).

545 47 U.S.C. § 201(a).

546 Over a hundred years ago, the Supreme Court affirmed the common law principle that private property used for common carrier purposes is imbued with a public character. Munn v. Illinois, 94 U.S. 113, 126 (1876).

their unique position as common carriers controlling bottleneck facilities, LECs must be deemed to expect that their property will be subject to Title II regulation, including interconnection requirements. Regulatory agencies have ordered access to common carrier bottleneck facilities for the purpose of increasing competition and facilitating the development of new services,[547] or have imposed other requirements to satisfy statutorily-mandated public interest objectives.[548] For example, in Ruckelshaus v. Monsanto Co.,[549] the Court held that an Environmental Protection Agency (EPA) regulation requiring applicants for pesticide registrations to submit trade secret data that would be disclosed to other parties did not violate the Fifth Amendment.[550] The Court found that "such restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community'"[551] and that the company submitted the data in voluntary exchange for the economic advantages of a pesticide registration.[552] Likewise, Tier 1 LECs are exchanging compliance with lawful Commission regulation under Title II of the Act for the valuable privilege of providing telephone service to the general public as interstate dominant common carriers.

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547 See, e.g., United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912) (antitrust court ordered railroads to provide competitors equivalent access to bottleneck railway terminal facilities), appeal after remand, 236 U.S. 194 (1915); Cellular Communications Systems, 86 FCC 2d 469, 495-96 (1981) (Commission required telephone companies to furnish interconnection to cellular systems upon terms no less favorable than those used by or offered to wireline carriers), modified, 89 FCC 2d 58 (1982), further modified, 90 FCC 2d 571 (1982); Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 RR 2d 1275 (1986), clarified, 2 FCC 2d 2910 (1987), aff'd on recon., 4 FCC Rcd 2369 (1989) (Commission clarified policies regarding interconnection of cellular and other radio common carrier facilities to landline network); Lincoln Tel. & Tel. Co., 659 F.2d at 1103-06 (court upheld Commission's order requiring Lincoln to provide interconnection facilities to MCI).

548 For example, in CPE Detariffing, the Commission required AT&T to detariff and sell its customer premises equipment (CPE). CPE Detariffing (Computer II), 95 FCC 2d 1276, 1295-96, recon. denied, 100 FCC 2d 1290 (1983). We rejected AT&T's Fifth Amendment claim because we found that the sale requirement was reasonably related to our legitimate objective of protecting the ratepayer's equitable share of the gains on regulated assets and the public's interest in the availability of reasonably priced CPE. Id. at 1295.

549 467 U.S. 986 (1984).

550 467 U.S. at 1004-08.

551 467 U.S. at 1007 (citations omitted).

552 467 U.S. at 1007-08.

237. Finally, the third factor in a takings inquiry considers the economic impact of the regulation on the property owner. Tier 1 LECs will suffer little adverse economic effect from the Commission's decision to implement expanded interconnection by providing a right to physical collocation.[553] We specifically permit the LECs to recover from interconnectors the direct cost of providing expanded interconnection services plus reasonable overhead loadings. We also are granting Tier 1 LECs increased pricing flexibility in conjunction with expanded interconnection.

238. Even If Physical Collocation Were a Taking, There Would Be No Fifth Amendment Violation. Even if physical collocation were deemed a taking, it does not violate the Fifth Amendment because the constitutional requirements will be satisfied and the LECs will receive just compensation. First, the Commission has authority to engage in a taking. The federal government, including Congress, has broad authority to take property for a public purpose.[554] Congress by legislative action can delegate its authority to an independent agency such as this Commission.[555] We have broad delegated authority from Congress under Sections 1 and 4 of the Communications Act,[556] as well as specific authority under Title II of the Act to regulate interstate common carriers in the public interest.[557] In providing for an interconnector right to physical collocation, we are exercising our statutory authority.

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553 Removing barriers to access competition will present the LECs with increased competitive challenges whether accomplished through virtual or physical collocation.

554 See Berman v. Parker, 348 U.S. 26, 33 (1954) ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear . . . the power of eminent domain is merely a means to an end"). Accord Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 239-40 (1984).

555 See Southern California Financial Corp., 634 F.2d 521, 523 (Ct. Cl. 1980) (congressional authorization can be express or implied), cert. denied, 451 U.S. 937 (1981). See generally Monsanto, 467 U.S. at 1010-14 (in holding that EPA use and disclosure of trade secret data under federal statute could constitute a taking, Court did not question agency's authority to engage in taking).

556 47 U.S.C. §§ 151 & 154.

557 See General Telephone Co. of the Southwest v. United States, 449 F.2d 846, 864 (5th Cir. 1971) ("The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests"). See also Permian Basin Area Rate Cases, 390 U.S. 747, 768-74 (1968) (Federal Power Commission's rate regulations adopted pursuant to "just and reasonable standard" in Natural Gas Act were constitutional), reh'g denied, 392 U.S. 917 (1968).

239. Second, the physical collocation requirement serves a public purpose. We have concluded that giving interconnectors a right to physical collocation is necessary to ensure prompt achievement of the full benefits of expanded interconnection for special access. Furthermore, the "public purpose" requirement is satisfied even where private parties (e.g., interconnectors) use the affected property, rather than the general public. It is necessary only that the action benefit the public.[558] The purpose of physical collocation is to bring the overall benefits of enhanced competition in the interstate special access market to the United States economy.

240. Finally, by requiring that Tier 1 LECs receive compensation from interconnectors, we are providing a mechanism for the payment of compensation,[559] and the LECs will have a Tucker Act right[560] to seek

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558 For example, in Midkiff, the Supreme Court held constitutional a statute authorizing the state of Hawaii to take title to real property from lessors and transfer it to lessees. According to the Court, the fact that the property taken outright by eminent domain was transferred to private beneficiaries did not destroy the public purpose of the action. It was sufficient that the purpose of the transfer was to benefit the public as a whole by reforming the land oligopoly in Hawaii; the government may take property for a public purpose even if the government itself does not possess it. 467 U.S. at 241-45. See also CPE Detariffing, 95 FCC 2d at 1295-96 (in decision detariffing embedded CPE, Commission rejected AT&T's argument that even if there were just compensation, private property could not be taken for private use of another).

559 See Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194-95 (1985) (it is only necessary that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking; "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process [results in compensation], then the property owner [has no takings claim]"). See also Monsanto, 467 U.S. at 1013-14 (compensation may be agreed to by parties); Albrecht v. United States, 329 U.S. 599, 603 (1947) ("Fifth Amendment does not prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken"); Bauman v. Ross, 167 U.S. 548, 593 (1897) ("the estimate of the just compensation . . . may be entrusted by Congress to commissioners appointed by a court or by the executive"); Glosemeyer v. Missouri-Kansas Texas R. Co., 685 F. Supp. 1108, 1119-20 (E.D. Mo. 1988), aff'd, 879 F.2d 316 (8th Cir. 1989), cert. denied, 494 U.S. 1003 (1990) (Fifth Amendment only requires that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking), citing Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974) and Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 659 (1890). But see Florida Power Corp. v. FCC, 772 F.2d 1537, 1544-46 (11th Cir. 1985) (FCC does not have power to determine just compensation), reh'g denied, 778 F. 2d 793 (1985), rev'd on other grounds, 480 U.S. 245 (1987); Monongahela Navigational Co. v. United States, 148 U.S. 312, 327 (1893) (question of compensation is judicial, not legislative function).

compensation or to challenge the "justness" of the amount in the Court of Claims.[561] Furthermore, the fact that Tier 1 LECs will receive compensation from interconnectors, rather than directly from the government, is inconsequential under the Fifth Amendment,[562] especially given the Tucker Act remedy. For these reasons, our requirement that Tier 1 LECs provide physical collocation does not violate the Fifth Amendment and is constitutional.

C. Effect on the States

1. Separations

241. Notice. We tentatively concluded that expanded interconnection for interstate special access should not have adverse separations impacts on the states. We reasoned that even if increased interstate special access competition causes some special access lines to be reassigned to the state jurisdiction, there should be no harm to the states because comparable revenues and costs would shift to the state jurisdiction.[563]

242. Comments. Some of the LECs argue that the diversion of significant demand for special access (and ultimately, switched transport) to

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560 The Tucker Act, 28 U.S.C. § 1491(a)(1), provides: "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded upon the Constitution, or any Act of Congress or any regulation of an executive department . . ."

561 Generally, a party claiming a Fifth Amendment taking by the United States can seek just compensation under the Tucker Act. Monsanto, 467 U.S. at 1016-17; United States v. Causby, 328 U.S. 256, 267 (1946). Where a taking occurs pursuant to statute, the statute need not specifically provide Tucker Act relief, but it must not expressly withdraw the Court of Claims jurisdiction under the Tucker Act. Monsanto, 467 U.S. at 1017 (where neither EPA statute, nor its legislative history addressed Tucker Act, Court treated statute as implementing an exhaustion requirement); Regional Rail Reorganization Act Cases, 419 U.S. 102, 125-27, 154-56 (1974) (jurisdiction of Claims Court depends on whether Congress withdrew Tucker Act remedy in statute; claim exists for any shortfall between compensation provided in statute and constitutional requirement of just compensation).

562 For example, in Monsanto, the Court upheld a federal statute that in operation allowed just compensation to be paid by a third party. The law authorized the EPA to use and disclose certain data submitted by an applicant for a pesticide registration when the EPA later considered a subsequent application by another party, as long as the second applicant compensated the first one. Monsanto, 467 U.S. at 1013-14. Similarly, in Midkiff, the government bought land and then sold it to existing tenants. Midkiff, 467 U.S. at 233-34. Thus, in that case, the government acted only as an intermediary; the tenants effectively paid the compensation.

563 Notice, 6 FCC Rcd at 3269, ¶ 65.

interconnectors would shift costs to the state jurisdiction[564] and could deprive state commissions of revenue streams that have been used to support local rates.[565] NYNEX states that separations impacts could be somewhat ameliorated if the state and interstate jurisdictions adopt complementary rules for expanded interconnection.[566] SW Bell argues that even complementary intrastate rules could result in increased costs to the states if the LECs are not allowed to compete effectively.[567] U S West asserts that the Commission has not sufficiently analyzed the separations impact of its proposals[568] and Cincinnati Bell contends that separations reform is necessary to enable LECs to compete fairly.[569]

243. TDS argues that expanded interconnection could shift costs to the intrastate jurisdiction that the LECs would be unable to recover, and thus impede infrastructure development in rural areas.[570] NTCA submits that requiring expanded interconnection for rural independent carriers would have substantial adverse effects.[571] They also argue that expanded interconnection could cause absurd separations results. Tallon Cheeseman proposes specific Part 36 changes that would facilitate interconnection while mitigating jurisdictional shifts.[572]

244. MFS agrees with the Commission's tentative conclusion that new interconnection arrangements for interstate special access will not have

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564 Bell Atlantic contends that in its region, loss of half of special access demand would shift more than $30 million in costs to the state jurisdiction. Bell Atlantic Reply Comments at 14. SW Bell estimates that the proposals in the Notice would result in a shift of $73.9 million in costs from the interstate to the intrastate jurisdiction. SW Bell Reply Comments at 17-18 & App. B. NYNEX alleges that a 14% loss of demand for special access would lead to a $17.5 million shift of revenue requirements from the interstate to the state jurisdiction in New York state. NYNEX Reply Comments, Exh. E at 3-4.

565 See, e.g., Ameritech Reply Comments at 55-58; BellSouth Comments at 12-15; GTE Comments at 50; SW Bell Comments at 26-29; SNET Comments at 10-11; USTA Comments at 65-68; SW Bell Reply Comments at 15-18 & App. B; Texas Telephone Ass'n Reply Comments at 2; Rochester Reply Comments at 24-25.

566 NYNEX Comments at 67-68.

567 SW Bell Comments at 29.

568 U S West Reply Comments at 63-65.

569 Cincinnati Bell Reply Comments at 17-18.

570 TDS Comments at 17-21.

571 NTCA Comments at 2-15.

572 Tallon Cheeseman Reply Comments at 4-7.

adverse separations effects on the states.[573] MFS argues that there should not be any change in the relative allocation of costs between the federal and state jurisdictions in the case of states that have authorized competition in the special access services market. MFS bases this conclusion on the belief that the relative amounts of interconnected services that CAPs provide for interstate and intrastate service should be the same after mandated interconnection as it was before.[574] It also contends that additional loop costs will not be shifted to the state jurisdiction even if the LECs lose material amounts of traffic due to expanded interconnection, in part because even under expanded interconnection, interconnectors will have to purchase one channel termination from the LEC.[575]

245. Several users argue that jurisdictional cost shifts or detrimental separations impacts are unlikely to result from expanded interconnection. They state that special access circuits are directly assigned to the interstate or intrastate jurisdiction along with the associated revenues. They argue that even in the unlikely event that a significant number of special access lines were reassigned to the intrastate jurisdiction, there would not be a burden on the states because any increase in costs would be offset by an increase in revenues.[576]

246. Some state commissions are concerned that expanded interconnection would cause cost shifts from the interstate to the state jurisdiction, due to the likely diversion of interstate switched usage to special access.[577] Virginia argues that existing separations procedures would not ensure that the costs of LEC facilities used to implement interstate-only expanded interconnection offerings would be assigned solely to the interstate side, while the revenues received from CAPs might be assigned completely to the interstate jurisdiction. D.C. argues that jurisdictional separations should be changed to allocate special access costs based on a specified minimum interstate special access line count so as to mitigate jurisdictional cost shifts.[578]

247. Discussion. We are sensitive to the states' concerns regarding possible collateral separations effects resulting from the implementation of expanded interconnection for the provision of special access. Based on the record, however, we conclude that these possible

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573 MFS Comments at 112.

574 Id. at 112-113.

575 MFS Reply Comments at 15-16.

576 Ad Hoc Comments at 35. Accord CompuServe Comments at 4-5; GSA Comments at 21-22; ICA Comments at 15-16, 20.

577 Florida Comments at 20-21; Virginia Comments at 3-5; Alabama Reply Comments at 5-6.

578 D.C. Comments at 4-5; D.C. Reply Comments at 6-7.

effects of expanded interconnection do not warrant a delay in implementation of our proposal. Some costs may be reassigned to the states as an indirect result of special access expanded interconnection, but any such cost reallocation would not be of sufficient magnitude to undermine universal service or threaten state regulatory programs. Moreover, the measures that we are adopting to permit additional LEC pricing flexibility should mitigate any separations effects by permitting the LECs to compete vigorously for special access traffic.[579]

248. We must, however, determine whether the current separations rules should be revised to specifically identify the cost of providing expanded interconnection in order to assure a proper jurisdictional allocation of LEC costs.[580] Accordingly, in the Second Notice of Proposed Rulemaking in this proceeding, we ask the Federal-State Joint Board in CC Docket No. 80-286 to determine whether such changes are necessary to ensure a reasonable jurisdictional allocation. If the Joint Board believes that this is necessary, we ask it to undertake the limited task of preparing recommended separations revisions designed to identify LEC expanded interconnection costs and revenues, and allocate them between the state and federal jurisdictions.[581] We believe that adoption of federal standards for special access expanded interconnection will assist the Joint Board in considering these matters.

2. Preemption

249. Notice. We did not propose to preempt state authority over intrastate access competition, although we recognized that federal policies may influence the development of access competition at the state level, just as state policies may affect federal developments.[582]

250. Comments. SW Bell argues that Commission action on expanded interconnection would in effect preempt state commissions from making their own determinations regarding collocation because neither LECs nor CAPs can identify intrastate versus interstate traffic.[583] GTE recommends that the

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579 See supra ¶ 172-86. By contrast, the LECs' estimates of separations shifts to the state jurisdiction assume that the LECs will not be given the freedom to compete and thus will lose very large portions of their special access traffic to the CAPs. See supra ¶ 15 & n.40.

580 Expanded interconnection will use certain LEC facilities differently than existing services and the traffic measurement criteria currently used for separations purposes will not necessarily reflect expanded interconnection arrangements.

581 Second Notice, ¶¶ 54-55.

582 Notice, 6 FCC Rcd at 3269, at ¶ 67.

583 SW Bell Comments at 31-34. See also Cincinnati Bell Comments at 2 n.5.

Commission defer to the states to facilitate valid experimentation, ensure complementary state and federal expanded interconnection standards, accommodate differing state-specific conditions, and conserve the Commission's scarce dispute resolution resources by enabling state commissions to resolve complaints on an informal basis.[584] Ameritech also argues that the Commission should craft its rules to avoid conflict with state experiments.[585]

251. Several CAPs contend that no preemption issues are raised by the Notice because the rules would apply only to the carriage of interstate special access traffic.[586] MFS asserts, however, that to the extent the Commission prescribes rules for expanded interconnection architecture it would as a practical matter preclude any inconsistent state requirements.[587] MFS nevertheless argues that nothing in the proposed rules would affect the states' ability to determine their own pricing rules, or to preclude interconnection altogether.[588] MFS further argues that, while innovation and experimentation by the states has been very beneficial, it is important for the Commission to assert a national leadership role given the inconsistency among state interconnection policies, which ultimately could impair delivery of interstate services.[589] Teleport urges the Commission to be sensitive to state regulatory issues and to support further state initiatives in developing expanded interconnection.[590] Digital Direct, however, supports preemption, arguing that uniformity is necessary to facilitate competition and to assure that interconnectors and their customers are not subjected to multiple state standards that could result in inefficiencies and delays.[591]

252. Several state commissions express concern that federal action in this proceeding would effectively preempt state authority over intrastate access and exchange competition.[592] NARUC contends that expanded interconnection for interstate special access would give interconnectors de facto ability to provide intrastate service without detection, even in states that

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584 GTE Reply Comments at 15-28.

585 Ameritech Reply Comments at 54, 66-67. See also New York Comments at 13-14; NARUC Comments at 15.

586 Teleport Denver Comments at 14-15; MFS Comments at 24.

587 MFS Reply Comments at 7-9.

588 Id.

589 Id. See also MFS Ex Parte at 2 (Sept. 9, 1992).

590 Teleport Comments at 40.

591 DDI Comments at 5-7.

592 Michigan Comments at 16-17, 20; Alabama Reply Comments at 4-5; Arkansas/Missouri Reply Comments at 6-7.

determine that expanded interconnection for intrastate service is not in the ratepayers' best interest. Thus, NARUC argues that any final rule should permit states to determine independently whether and how to allow collocated interconnection for service within their jurisdictions.[593] New York urges the Commission to recognize that state standards need not mirror federal standards, and proposes that the Commission require the LECs to submit detailed justification for using such regulatory differences to impose inefficient, differing architecture requirements in their intrastate and interstate interconnection offerings.[594] New York also suggests that if states adopt switched access expanded interconnection before the Commission does, the Commission should permit state-specific switched access expanded interconnection arrangements that complement intrastate arrangements.[595] Virginia proposes that no expanded interconnection arrangement be implemented unless approved by both the Commission and the state commission.

253. Discussion. Based on the record before us, we do not believe that there is a need for preemption of existing state programs in order to permit initial implementation of expanded interconnection for interstate special access. Indeed, a number of states have played a leadership role in shaping the development of expanded interconnection. We have learned much from these state initiatives, which demonstrate the continuing vitality and importance of the states' role as laboratories for regulatory innovation.

254. In this Order, we are taking actions to minimize the potential conflict between differing federal and state expanded interconnection policies. Specifically, we are providing for exemptions from the requirement that interstate physical collocation be made available to interconnectors based on timely state regulatory or legislative decisions.[596] In addition, if a LEC offers both interstate and intrastate expanded interconnection using either a physical or virtual collocation regime, it should provide collocation in a manner that satisfies both federal and state requirements. These measures should help to reduce the potential for federal/state conflict and should limit the ability of LECs to attempt to use different approaches to expanded interconnection in the federal and state jurisdictions to unfairly disadvantage interconnectors.

255. We also expect the LECs and interconnectors to negotiate reasonable mechanisms to avoid double payment for LEC expanded interconnection facilities used for both state and interstate expanded interconnection. For example, if under a state physical collocation program, an interconnector has paid the full cost of space preparation, we do not expect

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593 NARUC Comments at 5-6, 14-15; NARUC Additional Comments at 6-8 (Nov. 27, 1991).

594 New York Comments at 13-14. See also Ameritech Reply Comments at 54.

595 New York Comments at 16.

596 See supra ¶ 41.

additional interstate charges to be applied unless further work is required to permit interstate expanded interconnection.

D. Implementation Schedule and Dispute Resolution Procedures

1. Implementation Schedule

256. Notice. We proposed that LECs be required to implement expanded interconnection for DS1 and DS3 services as soon as possible after adoption of this Order.[597] With regard to other special access services, we proposed to allow LECs to implement the new rate structure changes for each of the four price cap special access service categories upon receipt of a request for expanded interconnection for one or more services in the category.[598]

257. Comments. MFS argues that the Tier 1 LECs should be required to make expanded interconnection for all special access services available immediately rather than only after a request is received because MFS does not believe there is a need for LECs to restructure their special access services when they file collocation tariffs. MFS suggests, however, that smaller LECs should not be required to file tariffs until an interconnection request is received.[599]

258. Some LECs contend that collocation for services other than DS1 and DS3 should not be required at this time.[600] Bell Atlantic asks for discretion, however, to respond to collocation requests for other services when technologically and economically feasible.[601] SW Bell argues that implementation of rate structure changes should be on a service by service basis, rather than by price cap baskets.[602]

259. Discussion. We conclude that the Tier 1 LECs should be required to implement special access expanded interconnection as soon as possible. We require these LECs to file tariffs for expanded interconnection for DS1 and DS3 service within 120 days from the date of release of this

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597 Expanded interconnection for DS1 and DS3 services allows a third party to provide its own DS1 and DS3 service between a LEC central office and a third party premises. Under these arrangements, however, interconnectors will be able to connect to, and resell, other LEC services, such as voice grade special access.

598 Notice, 6 FCC Rcd at 3266, ¶ 44.

599 MFS Comments at 119-21.

600 Bell Atlantic Comments at A-14, SW Bell Comments at C-11-12, United Comments at 3.

601 Bell Atlantic Comments at A-14.

602 SW Bell Comments at C-12.

Order without waiting for requests for interconnection.[603] The tariffs are to be filed to be effective on 90 days notice. The tariffs are to make physical collocation generally available under uniform terms and conditions in all end offices and serving wire centers, as well as any subject remote nodes, although, as explained in more detail above,[604] rates for items such as floor space, power, and environmental conditioning may vary by office. The tariffs are also to make virtual collocation generally available in all study areas where intrastate virtual collocation arrangements are provided and in any study areas where the LEC has negotiated virtual collocation arrangements with interconnectors.[605] After LEC expanded interconnection services become available in a particular study area, and the cross-connect element has been taken by at least one interconnector, we will permit the LEC to implement a system of density pricing in that particular study area.

260. If a LEC seeks an exemption from the general requirement that physical collocation be made available with respect to any specific central offices based on space availability, it should file a petition for such an exemption at the same time that it files its initial tariffs.[606] To facilitate tariff implementation, the initial tariff filing need not offer physical collocation in individual offices for which such exemption petitions have been filed. In the event that petitions for exemption based on space availability are denied with respect to any central offices, the LEC is to

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603 Once the initial expanded interconnection tariffs are filed, the LECs are to file tariffs to provide for the expanded interconnection of fiber optic and microwave special access services other than DS1 and DS3 service within 45 days of receipt of a bona fide request, to be effective upon 45 days notice. If a bona fide request for such services is made before the date of filing the initial expanded interconnection tariffs, the LECs are to make every effort to include those services in their initial expanded interconnection tariff filings. Further tariff revisions to cover additional services that could not be included in the initial tariff filing due to the lack of advance notice, are to filed as soon as possible.

604 See supra ¶ 158 (tariffing requirements for various connection charge rate elements).

605 Any negotiated virtual collocation arrangements are to be made available to all interested parties throughout the study area, pursuant to the tariffing requirements described above. These requirements will force the LECs to offer both physical and virtual collocation in some central offices. We conclude that the public interest benefits of these requirements outweigh the burdens to the LECs of offering both forms of collocation in those central offices.

606 Such requests will be acted upon as expeditiously as possibl.

file tariff revisions within 14 days, effective on 15 days notice, to make physical collocation available in those offices.[607]

261. The initial tariffs are to offer physical collocation in all offices not covered by an exemption petition based on space availability, unless an exemption based on state regulation has already been granted. Petitions for exemption based on state regulatory grounds that are filed on or before the date of the initial expanded interconnection tariff filings will be acted upon within the tariff review period whenever possible.[608] In such cases, the initial tariff filing is also to contain the virtual collocation offering that the LEC would implement if its exemption petition based on state regulation is granted. If the exemption is granted, the LEC will be permitted to withdraw its physical collocation offering for the affected offices prior to its effective date, and implement the virtual collocation offering instead.

262. In addition, we wish to avoid unnecessarily delaying the benefits of interstate special access expanded interconnection in states where interconnection arrangements for intrastate special access already exist. Therefore, we require those LECs with existing intrastate expanded interconnection arrangements to file on an expedited basis federal tariffs allowing interstate special access traffic to be carried over existing state arrangements pursuant to state rates[609] except for the contribution charge.[610] The establishment of these interim tariffs will permit expedited implementation of interstate special access expanded interconnection when feasible, accelerating the benefits of expanded interconnection and reducing potential LEC incentives for delay in implementing expanded interconnection

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607 This procedure will not apply to the extent that it would make the tariff provisions for the offices involved effective prior to the effective date of the remainder of the expanded interconnection tariff filing. In such cases, the necessary tariff revisions are to be effective at the same time as the remainder of the expanded interconnection filing.

608 See supra ¶ 41.

609 We find that the use of state rates in the interim interstate expanded interconnection tariffs is acceptable during the short period of time before the affected LECs file permanent tariffs that comply with the standards in this Order. We believe that the use of state rates in this instance is in the public interest, given our desire for expeditious implementation of expanded interconnection for interstate special access in those states where intrastate arrangements are already available, in order to foster the benefits of expanded interconnection. Accordingly, we waive the general requirements in Sections 61.38 and 61.49(g)-(i) of our rules, 47 C.F.R. §§ 61.38 & 61.49(g)-(i), that tariffs for new services be filed with cost support data, with respect to these interim expanded interconnection tariffs.

610 As a result, the LECs will not be allowed to include explicit or implicit contribution charges in these interim federal tariffs.

tariffs reflecting the requirements in this Order.[611] The LECs subject to this requirement[612] are to file these interim tariffs within 30 days of release of this Order[613] to be effective on 21 days notice.

263. Finally, we believe that information on the implementation of special access expanded interconnection, and of resulting developments in the interstate access marketplace, is important. Accordingly, we require the seven Regional Bell Operating Companies and GTE[614] to file reports that identify which parties are using expanded interconnection in their service territories and the offices in which they are interconnected two and four years after their initial interstate expanded interconnection tariffs take effect.[615]

2. Dispute Resolution Procedures

264. Comments. Several CAPs urge the Commission to establish expedited complaint resolution procedures or an expedited arbitration system to resolve implementation disputes between the LECs and interconnecting

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611 See Lincoln Tel. and Tel. Co., 659 F.2d at 1107-1108 (interpreting Section 154(i) as giving FCC authority to prescribe interim billing and collection arrangements in conjunction with an interconnection order).

612 This requirement applies to Central Telephone Co. of Illinois, Illinois Bell Telephone Co., New England Telephone and Telegraph Co., New York Telephone Co., Pacific Bell, and Rochester Telephone Co. This requirement will also apply to Bell Telephone Co. of Pennsylvania (Bell of Pennsylvania) in the event that the Pennsylvania Public Utilities Commission allows the intrastate expanded interconnection tariff that the company filed on October 1, 1992 (or a modified version of that tariff) to go into effect within 90 days of the release of this Order. In that case, Bell of Pennsylvania is to file its interim interstate tariff within 21 days of the effective date of the Pennsylvania tariff, to be effective on 21 days notice.

613 Given the relatively limited administrative burdens that this requirement places on these LECs and the benefits of avoiding further delay in the implementation of interstate expanded interconnection, we conclude that good cause exists to make this requirement effective less than 30 days from publication of this Order in the Federal Register.

614 We are applying this requirement only to the largest eight LEC holding companies because these companies account for over 90% of the local exchange market, and because we wish to minimize the information gathering burden on other carriers. If they wish, however, smaller Tier 1 LECs may voluntarily provide such information.

615 Based on the information contained in these reports, we will decide whether to require similar reports in the future. We delegate authority to the Chief, Common Carrier Bureau, to determine the format and the specific information to be provided in these reports.

parties to prevent unnecessary delays in implementation of expanded interconnection.[616] They also urge the designation of specific staff to mediate such disputes. Locate also suggests that a procedure be established, as was done in New York, permitting a party to request a task force comprised of all parties to the dispute and chaired by a Commission staff person. Locate proposes that the task force be required to meet within thirty days and given forty-five days to reach a consensus, after which the Commission staff member would present the majority position to the Commission.[617] Other parties could file opposing comments and the Commission would issue a ruling based on the record compiled during the negotiations. Teleport asks that disputes be responded to within thirty days.[618]

265. The LECs generally argue that no expedited dispute resolution procedure is necessary, and that any disputes can be handled through the Commission's complaint process. Pacific and NYNEX, for example, argue that the Commission should promulgate general guidelines under which parties can work out satisfactory arrangements, and contend that detailed rules or novel dispute resolution procedures are unnecessary.[619]

266. Discussion. It is important that there be an expeditious implementation of interstate expanded interconnection. Accordingly, we have resolved a number of implementation issues in this Order, placing various specific requirements on the LECs. We have also required an expeditious filing of expanded interconnection tariffs by the LECs, recognizing that certain implementation issues will be resolved in the tariff review process. Thus, we believe that there will be relatively few additional implementation issues to be resolved after the expanded interconnection tariffs go into effect. Resolution of any remaining disputes can be quick and efficient. We conclude that the development of specific, detailed dispute resolution procedures, or the designation of a formal ombudsman or task force, are not necessary. In addition, parties will have access to the Commission's Alternative Dispute Resolution (ADR) procedures as a possible path for resolution of certain disputes.[620]

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616 Locate Comments at 42, 48; Teleport Denver Comments at 7-8; MFS Comments at 19-21; Teleport Comments at 37-38.

617 Locate Comments at 48.

618 Teleport Comments at 38.

619 Pacific Reply Comments at 73-74; see also NYNEX Reply Comments at Exh. 9.

620 Use of Alternative Dispute Resolution Procedures, Initial Policy Statement and Order, 6 FCC Rcd 5669 (1991). See also Use of Alternative Dispute Resolution Procedures, Memorandum Opinion and Order, GC Docket No. 91-119, FCC 92-316 (released July 10, 1992).

IX. NOTICE OF PROPOSED RULEMAKING ON AMENDMENT OF THE PART 69 ALLOCATION OF GENERAL SUPPORT FACILITY COSTS

267. As discussed above,[621] we are not permitting the LECs to impose a contribution charge at this time. Instead, we are proposing to eliminate the only regulatory mechanism identified in the current record as potentially warranting a contribution charge. Section 69.307 of our Rules[622] requires the LECs to apportion GSF investment among categories based on investment in central office equipment, information origination/termination equipment, and cable and wire facilities excluding Category 1.3, the investment in subscriber lines.[623] This allocation also has collateral effects on the allocation of GSF expenses,[624] as well as other operating expenses.[625] As a result, costs are under-allocated to the common line category and over-allocated to other access categories, including special access and transport.

268. The current language in Section 69.307 was designed to ensure that the adoption of certain changes to the separations and accounting rules would be revenue-neutral with respect to the interstate common line category.[626] We now tentatively conclude, however, that the benefits of this are outweighed by the potential adverse effects on the development of competition in interstate access markets.[627]

269. We therefore propose to modify Section 69.307 by deleting the words "excluding Category 1.3," and we invite interested parties to comment on this proposal. We also ask interested parties to propose specific methodologies for calculating a contribution charge to recover over-allocated GSF for use in the event that we do not ultimately adopt our proposal for reallocation of GSF costs.

X. CONCLUSION

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621 See supra ¶¶ 143-49.

622 47 C.F.R. § 69.307.

623 See 47 C.F.R. § 36.154(a) for a definition of Category 1.3.

624 See, e.g., 47 C.F.R. § 69.401(a)(2).

625 See, e.g., 47 C.F.R. §§ 69.309, 69.401(a)(1), 69.402(b), 69.403, 69.406(a)(1) & (7), 69.408 & 69.411.

626 Amendment to Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It With Part 36, Jurisdictional Separations Procedures, 2 FCC Rcd 6447, 6452 (1987).

627 This change would result in minor increases in total switched access costs in the Subscriber Line Charge (SLC) in those few jurisdictions where the current SLC is below the $3.50 cap, or the multi-line business SLC is below the $6.00 cap.

270. In this Order, as a part of its efforts to bring customers the full advantages of newly developing competition, the Commission takes an important step toward increased competition in the provision of interstate access services by removing barriers to competitive interconnection found in LEC special access rate structures. This Order requires Tier 1 LECs to offer expanded opportunities for interconnection with their networks for the provision of interstate special access service. Tier 1 LECs are generally required to offer expanded interconnection through physical collocation to interconnectors that request it and, under certain limited circumstances, virtual collocation arrangements as well. This Order also provides that expanded interconnection of third party transmission facilities will be available to all interested parties, including CAPs, IXCs, and end users. The LECs will include connection charges in their tariffs implementing our expanded interconnection policy that are designed to compensate the LECs for services offered to interconnectors. The Commission is also authorizing some additional pricing flexibility to enable the LECs to price their own services in response to competition. Together, these measures establish an equitable regulatory framework for increased competition in the interstate special access market.

XI. PROCEDURAL MATTERS

A. Report and Order on Expanded Interconnection with Local Telephone Company Facilities — Regulatory Flexibility Act

271. In the Notice of Proposed Rulemaking in this proceeding, we certified that the proposed rule changes related to expanded interconnection would apply only to carriers providing interstate access transmission services, which are large corporations or affiliates of such corporations, and that the Regulatory Flexibility Act of 1980 therefore did not apply. Neither the Chief Counsel for Advocacy of the Small Business Administration nor any other commenting party disagreed with our analysis. The Secretary shall send a copy of this Report and Order, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with ¶ 605(b) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq.

B. Notice of Proposed Rulemaking on Amendment of the Part 69 Allocation of General Support Facility Costs

1. Ex Parte

272. This proceeding is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

2. Regulatory Flexibility Act

273. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because the proposed rule amendment, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers providing interstate access transmission lines for telecommunications services directly subject to the proposed rule amendment are large corporations or affiliates of such corporations. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with ¶ 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq.

3. Notice and Comment Provision

274. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before December 4, 1992, and reply comments on or before December 21, 1992. To file formally in this proceeding, persons must file an original and five copies of all comments, reply comments, and supporting comments. Parties that want each Commissioner to receive personal copies of their comments must file originals plus nine copies. Parties should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. For further information regarding this Notice of Proposed Rulemaking, contact Douglas L. Slotten, Common Carrier Bureau, Policy and Program Planning Division, (202) 632-9342.

XII. ORDERING CLAUSES

275. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4(i), 201-205 and 214(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205 & 214(d), Parts 61, 64, 65 and 69 of the Commission's Rules are AMENDED as set forth in Appendix B hereto.

276. IT IS FURTHER ORDERED that the policies, rules, and requirements set forth herein ARE ADOPTED.

277. IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau is delegated the authority specified herein to act upon implementation details pertaining to expanded interconnection.

278. IT IS FURTHER ORDERED that the policies, rules, and requirements adopted herein SHALL BE EFFECTIVE 90 days after publication in the Federal Register, except for our requirement, which shall be effective 30 days from release of this Order, for the filing of interim expanded interconnection tariffs.[628]

279. IT IS FURTHER ORDERED that the Motion of the United States Department of Justice for Leave to File Reply Comments Out of Time and the Motion of the Association for Local Telecommunications Services for Leave to File Supplemental Comments Out of Time ARE GRANTED.

280. IT IS FURTHER ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes regarding revision of Section 69.307 of our Rules, 47 C.F.R. § 69.307, as described above, and that COMMENT IS INVITED on these proposals.[629]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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628 Since this requirement applies to fewer than 10 entities, it is not subject to the requirements of the Paperwork Reduction Act. See supra note 612.

629 This action is taken pursuant to Sections 1, 4(i) & (j), 201-205, 218, 220 & 404 of the Communications Act, 47 U.S.C. §§ 151, 154(i) & (j), 201-205, 218, 220 & 404.

APPENDIX A

COMMENTS FILED IN RESPONSE TO
NOTICE OF PROPOSED RULEMAKING
(CC DOCKET NO. 91-141)

August 6, 1991

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Allnet Communication Services (Allnet)
American Newspaper Publishers Association (ANPA)
American Petroleum Institute (API)
Ameritech Operating Companies (Ameritech)
Association for Local Telecommunications Services (ALTS)
Association of American Railroads (AAR)
AT&T
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Telephone Companies (BellSouth)
California Bankers Clearing House Association and New York Clearing House Association (Bankers)
The People of the State of California and the Public Utilities Commission of the State of California (California)
Central Telephone Company (Centel)
Cellular Service, Inc.
Cincinnati Bell Telephone Company (Cincinnati Bell)
Competitive Telecommunications Association (CompTel)
CompuServe Inc. (CompuServe)
Digital Direct, Inc. (Digital Direct)
Public Service Commission of the District of Columbia (D.C.)
EDS Corporation (EDS)
Florida Public Service Commission (Florida)
FMR Corp. (FMR)
General Communication, Inc. (GCI)
U.S. General Services Administration (GSA)
GTE Service Corporation (GTE)
Illinois Commerce Commission (Illinois)
Independent Data Communications Manufacturers Association, Inc. (IDCMA)
Indiana Digital Access, Inc. (IDA)
Information Industry Association (IIA)
Institutional Communications Company (ICC)
Intermedia Communications of Florida, Inc. (Intermedia)
International Communications Association (ICA)
Lincoln Telephone and Telegraph Company (Lincoln)
Local Area Telecommunications, Inc. (Locate)
MCI Telecommunications Corporation (MCI)
MetroComm
Metropolitan Fiber Systems, Inc. (MFS)
Michigan Public Service Commission Staff (Michigan)
MidAmerican Communications Corporation (MidAmerican)
National Association of Regulatory Utility Commissioners (NARUC)
National Exchange Carrier Association, Inc. (NECA)
National Telephone Cooperative Association (NTCA)

New York State Department of Public Service (New York)
NYNEX Telephone Companies (NYNEX)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell and Nevada Bell (Pacific)
Penn Access Corporation
Pennsylvania Office of Consumer Advocate
Personal Communications Network Services of New York, Inc. (PCNS-NY)
Puerto Rico Telephone Company (PRTC)
RCI Long Distance of New England, Inc. d/b/a Long Distance North (Long Distance North)
Rochester Telephone Corporation (Rochester)
Chief Counsel for Advocacy of the U.S. Small Business Administration (SBA)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SW Bell)
US Sprint Communications Company Limited Partnership (Sprint)
TDS Telecommunications Corporation (TDS)
Teleport Communications Group (Teleport)
Teleport Denver Ltd. (Teleport Denver)
United States Telephone Association (USTA)
United Telephone System Companies (United)
U S West Communications, Inc. (U S West)
Utilities Telecommunications Council (UTC)
Virginia State Corporation Commission Staff (Virginia)
Wells Rural Electric Company
Williams Telecommunications Group, Inc. (WilTel)

REPLY COMMENTS FILED IN RESPONSE TO
NOTICE OF PROPOSED RULEMAKING
(CC DOCKET NO. 91-141)

September 20, 1991

Ad Hoc
Alabama Public Service Commission (Alabama)
ALTS
Ameritech
Anchorage Telephone Utility
API
Arkansas Public Service Commission and Missouri Public Service Commission (Arkansas/Missouri)
Associated Communications of Los Angeles, Inc. (ACLA)
AT&T
Bankers
Bay Area Teleport
Bell Atlantic
BellSouth
California
Centel
Cincinnati Bell

CompTel
D.C.
Fairbanks Municipal Utilities System
Electric Lightwave, Inc.
FMR
GCI
GSA
GTE
ICA
ICC
IDA
IDCMA
Intermedia
U.S. Department of Justice (Justice)
Kansas Independent Rural Telephone Companies
Linkatel Communications, Inc.
Locate
Matanuska Telephone Association, Inc.
McCaw Cellular Communications, Inc. (McCaw)
MCI
MFS
MidAmerican
Minnesota Department of Public Service (Minnesota Dept.)
Minnesota Public Utilities Commission (Minnesota Commission)
U.S. National Telecommunications and Information Administration (NTIA)
NECA
New York City Department of Telecommunications and Energy (New York City)
North American Telecommunications Association (NATA)
NTCA
NYNEX
OPASTCO
Pacific
PRTC
Rochester
SNET
Sprint
SW Bell
Tallon, Cheeseman and Associates, Inc. (Tallon Cheeseman)
TDS
Teleport
Teleport Denver
Texas Telephone Association
USTA
United
U S West
WilTel

COMMENTS FILED IN RESPONSE TO
SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING
(CC DOCKET NO. 91-141)

November 5, 1991

Ameritech
ALTS
Bell Atlantic
BellSouth
California
Centel
Cincinnati Bell
CompTel
Consolidated Telephone Company and Consolidated Telco, Inc. (Consolidated)
GTE
MCI
MFS
NECA
NYNEX
Pacific
Rochester
SNET
Sprint
SW Bell
Tallon Cheeseman
Teleport
Teleport Denver
USTA
United
U S West
WilTel

REPLY COMMENTS FILED IN RESPONSE TO
SUPPLEMENTAL NOTICE OF PROPOSED RULEMAKING
(CC DOCKET NO. 91-141)

December 10, 1991

Ameritech
ALTS
Bell Atlantic
BellSouth
CompTel
GSA
GTE
MCI
MFS
NARUC ("Additional Comments," filed November 27, 1991)
NTCA
NYNEX

Pacific
Rochester
Sprint
SW Bell
Tallon Cheeseman
Teleport
Teleport Denver
USTA
United
U S West
WilTel

APPENDIX B

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 61 — TARIFFS

Part 61 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 61 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.38 is amended by adding paragraphs (b)(3) and (b)(4), to read as follows:

§ 61.38 Supporting information to be submitted with letters of transmittal.

* * * * *

(b) Explanation and data supporting either changes or new tariff offerings. * * *

* * * * *

(3) For a tariff filing that introduces or changes a contribution charge for special access and expanded interconnection, as defined in § 69.122 of this chapter, the carrier must submit information sufficient to establish that the charge has been calculated in a manner that complies with the Commission order authorizing the contribution charge.

(4) For a tariff that introduces a system of density pricing zones for special access, as described in § 69.123 of this chapter, the carrier must, before filing its tariff, submit a density pricing zone plan including, inter alia, documentation sufficient to establish that the system of zones reasonably reflects cost-related characteristics, such as the density of total interstate traffic in central offices located in the respective zones, and receive approval of its proposed plan.

* * * * *

3. Section 61.47 is amended by redesignating paragraph (h) as paragraph (h)(1) and by adding the following new paragraph (h)(2):

§ 61.47 Adjustments to the SBI; pricing bands.

* * * * *

(h)(1) * * *

(2) In addition to the requirements of paragraph (h)(1) of this section, those local exchange carriers subject to price cap regulation that have established density pricing zones pursuant to § 69.123 of this chapter shall use the methodology set forth in paragraphs (a) through (d) of this section to calculate separate subindexes in each zone for DS1 services, DS3 services, and such other special access services that the Commission may designate by order. Notwithstanding paragraph (e) of this section, the annual pricing flexibility for each of these subindexes shall be limited to an annual increase of five percent or an annual decrease of ten percent, relative to the percentage change in the PCI for the special access services basket, measured from the last day of the preceding tariff year.

* * * * *

4. Section 61.49 is amended by revising the first sentence of paragraph (h), and by adding the following new paragraphs (i), (j), and (k), to read as follows:

§ 61.49 Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation.

* * * * *

(h) Each tariff filing by a local exchange carrier that introduces a new service that will later be included in a basket, or that introduces or changes the rates for connection charge subelements for expanded interconnection, as defined in § 69.121 of this chapter, must also be accompanied by

* * * * *

(i) Each tariff filing submitted by a local exchange carrier subject to price cap regulation that introduces or changes the rates for connection charge subelements for expanded interconnection, as defined in § 69.121 of this chapter, must be accompanied by cost data sufficient to establish that such charges will not recover more than a just and reasonable portion of the carrier's overhead costs.

(j) For a tariff filing that introduces or changes a contribution charge for special access and expanded interconnection, as defined in § 69.122 of this chapter, the carrier must submit information sufficient to establish that the charge has been calculated in a manner that complies with the Commission order authorizing the contribution charge.

(k) For a tariff that introduces a system of density pricing zones for special access, as described in § 69.123 of this chapter, the carrier must, before filing its tariff, submit a density pricing zone plan including, inter alia, documentation sufficient to establish that the system of zones reasonably reflects cost-related characteristics, such as the density of total interstate traffic in central offices located in the respective zones, and receive approval of its proposed plan.

PART 64 — MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225 unless otherwise noted.

2. Subpart N of Part 64 is added to read as follows:

PART 64 — MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

* * * * *

Subpart N — Expanded Interconnection

64.1401 Expanded interconnection
64.1402 Rights and responsibilities of interconnectors

* * * * *

Subpart N — Expanded Interconnection

Authority: Secs. 1, 4(i), 201-205, 214(d), and 220, as amended; 47 U.S.C. 151, 154(i), 201-205, 214(d), and 220.

§ 64.1401 Expanded interconnection.

(a) Every local exchange carrier that is classified as a Class A company under § 32.11 of this chapter and that is not a National Exchange Carrier Association interstate tariff participant, as provided in part 69, subpart G of this chapter, shall offer expanded interconnection for interstate special access services at their central offices that are classified as end offices or serving wire centers, and at other rating points used for interstate special access.

(b) The local exchange carriers specified in paragraph (a) of this section shall offer expanded interconnection for interstate special access services through physical collocation, except that they may offer virtual collocation instead of physical collocation, upon approval by the Commission, under the following circumstances:

(1) At an individual central office, if that office lacks physical space to accommodate physical collocation;

(2) For new customers at an individual central office, if the space available for physical collocation has been exhausted. Local exchange carriers shall not withdraw their offering of physical collocation for

existing customers due to space limitations, absent extraordinary circumstances; or

(3) In a state, if the state legislature or public utility regulatory agency issues a formal decision, after proceedings allowing all interested parties a reasonable opportunity to be heard, in favor of virtual collocation rather than physical collocation for intrastate expanded interconnection, or in favor of allowing local exchange carriers to choose which form of collocation to use for intrastate expanded interconnection. Exemption requests based on such final state decisions must be submitted by the date for filing initial interstate special access expanded interconnection tariffs.

(c) In addition to the obligations imposed by paragraph (b) of this section, the local exchange carriers specified in paragraph (a) of this section shall offer expanded interconnection for interstate special access services through virtual collocation in any study area used for the purposes of jurisdictional separations in which:

(1) A carrier is providing intrastate special access expanded interconnection through virtual collocation, or

(2) A carrier negotiates interstate special access virtual collocation arrangements with one or more interconnectors.

(d) For the purposes of this subpart, physical collocation means an offering that enables interconnectors:

(1) To place their own equipment needed to terminate basic transmission facilities, including optical terminating equipment and multiplexers, within or upon the local exchange carrier's central office buildings,

(2) To use such equipment to connect interconnectors' fiber optic systems or microwave radio transmission facilities (where reasonably feasible) with the local exchange carrier's equipment and facilities used to provide interstate special access services,

(3) To enter the local exchange carrier's central office buildings, subject to reasonable terms and conditions, to install, maintain, and repair the equipment described in paragraph (d)(1) of this section, and

(4) To obtain reasonable amounts of space in central offices for the equipment described in paragraph (d)(1) of this section, allocated on a first-come, first-served basis.

(e) For the purposes of this subpart, virtual collocation means an offering that enables interconnectors:

(1) To designate or specify equipment needed to terminate basic transmision facilities, including optical terminating equipment and multiplexers, to be located within or upon the local exchange carrier's central office buildings, and dedicated to such interconnectors' use,

(2) To use such equipment to connect interconnectors' fiber optic systems or microwave radio transmission facilities (where reasonably feasible) with the local exchange carrier's equipment and facilities used to provide interstate special access services, and

(3) To monitor and control their communications channels terminating in such equipment.

(f) Under both physical collocation offerings and virtual collocation offerings for expanded interconnection of fiber optic facilities, local exchange carriers shall provide:

(1) An interconnection point or points at which the fiber optic cable carrying an interconnectors' circuits can enter each central office, provided that the local exchange carrier shall designate interconnection points as close as reasonably possible to each central office; and

(2) At least two such interconnection points at any central office at which there are at least two entry points for the local exchange carrier's cable facilities.

§ 64.1402 Rights and responsibilities of interconnectors.

(a) For the purposes of this subpart, an interconnector means a party taking expanded interconnection offerings. Any party shall be eligible to be an interconnector.

(b) Interconnectors shall have the right, under expanded interconnection, to interconnect their fiber optic systems and, where reasonably feasible, their microwave transmission facilities.

(c) Interconnectors shall not be allowed to use interstate special access expanded interconnection offerings to connect their transmission facilities with the local exchange carrier's interstate switched services.

PART 65 — INTERSTATE RATE OF RETURN PRESCRIPTION PROCEDURES AND METHODOLOGIES

Part 65 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 65 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 65.702(b) is amended by revising the second sentence to read as follows:

§ 65.702 Measurement of interstate services earnings

* * * * *

(b) * * * The access service categories shall be: an aggregated category consisting of Special Access, § 69.113, Connection Charges for Expanded Interconnection, § 69.121, and Contribution Charges for Special Access and Expanded Interconnection, § 69.122; Common Line, §§ 69.104-69.105; and an aggregated category consisting of Line Termination, § 69.106, Intercept, § 69.108, Local Switching, § 69.107, Transport, §§ 69.111-69.112, and Information, § 69.109. * * *

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PART 69 -- ACCESS CHARGES

Part 69 of Title 47, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.4 is amended by revising paragraph (b) and adding paragraphs (e) and (f), to read as follows:

§ 69.4 Charges to be filed.

* * * * *

(b) Except as provided in subpart C of this part, in §§ 69.4(c), (d), (e), and (f), and in § 69.118, the carrier's carrier charges for access service filed with this Commission shall include charges for each of the following elements: * * *

* * * * *

(e) The carrier's carrier charges for access service filed with this Commission by the telephone companies specified in § 64.1401(a) of this chapter shall include an element for connection charges for expanded interconnection. The carrier's carrier charges for access service filed with this Commission by the telephone companies not specified in § 64.1401(a) of this chapter may include an element for connection charges for expanded interconnection.

(f) All telephone companies may implement a separate carrier's carrier tariff charge for the contribution charge element described in § 69.122 of this part, if authorized by the Commission by order.

3. Sections 69.121, 69.122 and 69.123 are added to subpart B to read as follows:

PART 69 — ACCESS CHARGES

* * * * *

Subpart B — Computation of Charges

* * * * *

69.121 Connection charges for expanded interconnection.
69.122 Contribution charges for special access and expanded interconnection.
69.123 Density pricing zones for special access.

* * * * *

§ 69.121 Connection charges for expanded interconnection.

(a) Appropriate connection charge subelements shall be established for the use of equipment and facilities that are associated with offerings of expanded interconnection for special access services, as defined in part 64, subpart N of this chapter.

(1) A cross-connect subelement shall be established for charges associated with the cross-connect cable and associated facilities connecting the equipment owned by or dedicated to the use of the interconnector with the telephone company's equipment and facilities used to provide interstate special access services. Charges for the cross-connect subelement shall not be deaveraged within a study area that is used for purposes of jurisdictional separations.

(2) Charges for subelements associated with physical collocation or virtual collocation, other than the subelement described in paragraph (a)(1) of this section, may reasonably differ in different central offices, notwithstanding § 69.3(e)(7).

(b) Connection charge subelements shall be computed based upon the costs associated with the equipment and facilities that are included in such subelements, including no more than a just and reasonable portion of the telephone company's overhead costs.

(c) Connection charge subelements shall be assessed upon all interconnectors that use the equipment or facilities that are included in such subelements.

§ 69.122 Contribution charges for special access and expanded interconnection.

(a) Any contribution charge that the Commission may, by order, permit shall be calculated in a manner that complies with the Commission order authorizing the contribution charge.

(b) Any contribution charge shall be assessed on a per unit of capacity basis, upon parties that use expanded interconnection for special access and upon customers of similar special access services offered by the telephone company.

§ 69.123 Density pricing zones for special access.

(a) Telephone companies may establish a reasonable number of density pricing zones within each study area that is used for the purposes of jurisdictional separations, in which at least one interconnector has taken the subelement of connection charges for expanded interconnection described in § 69.121(a)(1).

(b) Such a system of pricing zones shall be designed to reasonably reflect cost-related characteristics, such as the density of total interstate traffic in central offices located in the respective zones.

(c) Notwithstanding § 69.3(e)(7), telephone companies may charge rates for subelements of DS1, DS3, and such other special access services as the Commission may designate, that differ depending on the zone in which the service is offered, provided that the charges for any such service shall not be deaveraged within any such zone.

(1) A special access service subelement shall be deemed to be offered in the zone that contains the central office from which the service is provided.

(2) A special access service subelement provided to a customer between central offices shall be deemed to be offered in the highest priced zone that contains one of the central offices between which the service is offered.

(d)(1) Telephone companies not subject to price cap regulation may charge a rate for each service in the highest priced zone that exceeds the rate for the same service in the lowest priced zone by no more than fifteen percent of the rate for the service in the lowest priced zone during the period from the date that the zones are initially established through the following June 30. The difference between the rates for any such service in the highest priced zone and the lowest priced zone in a study area, measured as a percentage of the rate for the service in the lowest priced zone, may increase by no more than an additional fifteen percentage points in each succeeding year, measured from the rate differential in effect on the last day of the preceding tariff year.

(2) Telephone companies subject to price cap regulation may charge different rates for services in different zones pursuant to § 61.47(h) of this chapter.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

September 17, 1992

OFFICE OF
THE CHAIRMAN

STATEMENT OF CHAIRMAN ALFRED C. SIKES
Concurring in the Result and Dissenting in Part

Regarding Expanded Interconnection
for Special Access (CC Docket No. 91-141)

On September 17 my colleagues and I adopted three interrelated policy items that collectively take a historic step in opening the local exchange market to the benefits of competition. I am confident that we have removed many regulatory barriers to competition and support fully the thrust of our actions and most of the rules adopted. I am troubled, however, by one specific requirement: that local exchange carriers provide physical collocation to all interconnectors.

The Order states that "We . . . require the LECs subject to this Order to make physical collocation available to all interconnectors that request it." Yet, "the parties remain free, under this approach, to negotiate satisfactory virtual collocation arrangements if such arrangements are preferable to physical collocation. . ." This is doublespeak and does not give the clear guidance that the Commission owes U.S. industry and the American public.

It is unclear what problems the Commission is attempting to resolve by requiring local exchange carriers to offer physical collocation, particularly since the Order acknowledges that virtual collocation arrangements might be preferable to some parties seeking interconnection. The highly regulatory and inflexible approach the Commission has adopted seems likely to create more concrete problems than the illusory ones it seeks to resolve.

Furthermore, this requirement unnecessarily intrudes into the businesses of local exchange carriers. The physical collocation requirement raises serious questions about a "taking" or confiscation of local exchange carrier property in violation of the Fifth Amendment that are not adequately addressed by the Commission. I also have serious concerns about the local exchange carriers' ability to control access to their network facilities, and thus the impact of such a mandate on network reliability.

Finally, I believe that the Commission's requirement, while nominally deferring to current state policies, improperly places time and process constraints on state proceedings, essentially suggesting how and when states can best conduct their business and effectively undercutting any future state interconnection policies.

In light of these concerns, I am concurring as to our overall result in this docket, but dissenting to that portion of the order that requires the local exchange carriers to provide physical interconnection to all who request it.

I will look forward to reviewing the comments on reconsideration that address the specific action the Commission has taken requiring physical collocation in the context of the several issues I have raised.

Separate Statement of
Commissioner James H. Quello

RE: Expanded Interconnection for Interstate Special Access

Having served on the Commission during the years when increasing competition has become the hallmark of our regulatory efforts, I am particularly pleased to cast my vote in support of this Report and Order. By removing structural barriers to the competitive provision of interstate special access services we will bring the benefits of competition to the users of local carriers' special access termination facilities. In my judgment, the Commission has struck a generally fair balance between the competing interests involved by facilitating the development of new state-of-the-art transmission networks while looking to extend to local exchange carriers the flexibility to price their own services to compete with these new networks.

At the same time, however, I must confess to having several reservations about our decision to require local exchange carriers to offer physical co-location to all interconnectors wanting it. The record in this proceeding indicates that the only real difference between physical co-location and virtual co-location is whether the local exchange carrier or the interconnector installs, maintains, and repairs the interconnector's equipment. The Report and Order shows quite clearly that the Commission intends to closely scrutinize the local exchange carriers' performance of these functions on behalf of virtual co-locators in order to assure that the local exchange carriers treat the equipment exactly as they would their own. Under these circumstances, our predilection for physical co-location, and the procedures we prescribe to effectuate it, could well be a solution in search of a problem. More importantly, there is also the distinct possibility that in preferring physical over virtual co-location we may end up creating more problems than we solve. Therefore, I will pay particularly close attention to any subsequent pleadings discussing this issue and remain open to rethinking this aspect of today's decision if in my judgment it becomes necessary to do so.

September 17, 1992

STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Report and Order on Expanded Interconnection with Local Telephone Companies (CC Docket No. 91-141);
Second Notice of Proposed Rulemaking on Expanded Interconnection with Local Telephone Companies (CC Docket No. 80-286); and
Report and Order on Transport Rate Structure and Pricing (CC Docket No. 91-213)

The three actions we take today -- implementation of expanded interconnection for special access, a proposal to implement expanded interconnection for switched access, and adoption of a new transport rate structure and prices -- cover some of the most important, complex and controversial issues this Commissioner has ever tackled. The questions presented are intricate, difficult to grasp and not susceptible to "quick fixes." Yet, from a consumer's perspective the basic result of the decisions is amazingly straightforward: rates for special access and switched transport services will decrease as competition increases.

I have been vigilant throughout these proceedings to ensure that in our efforts to stimulate the development of competition we have also given proper weight to the legitimate concerns of existing carriers and existing customers. An example of this balancing process is evident in the Special Access Expanded Interconnection Order. Upon concluding that the public interest is best served by a collocation policy, we simultaneously revised our rules to allow local exchange carriers to revise their special access prices so that they would not be hamstrung from competing with alternative access carriers. Similarly, in the transport proceeding, on the one hand we implement an interim rate structure that avoids immediate, excessive rate impacts on the smaller interexchange carriers, while on the other, we eliminate the equal charge per minute of use pricing structure, thus ensuring that the LECs can better meet the needs of the larger interexchange carriers.

The Further Notices we adopt today provide concrete evidence that our work has just begun. A final permanent transport rate structure and pricing plan have yet to be developed because we appreciate the need to move cautiously in this new competitive environment. In addition, the questions we ask about adopting expanded interconnection for switched transport are more complex

and controversial in their potential effect on local customers than those we addressed in the special access environment.

I am confident, however, that the record developed in both proceedings will provide significant guidance to the Commission as we further pursue our goals of increased competition, lower rates for consumers and continued high quality service. I can not emphasize enough the importance a well-developed record plays in proceedings of this magnitude and I urge all interested parties to devote whatever time and resources are necessary to assist us in our efforts.

# # #

September 17, 1992

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: Expanded Interconnection with Local Telephone Company Facilities; Amendment of Part 69 Allocation of General Support Facility Costs (CC Docket No. 91-141)

This item is a major step toward increased competition in the provision of interstate access services. This item requires Tier 1 LECs to offer expanded opportunities for interconnection for the provision of interstate special access service. This Order also provides that expanded interconnection will be available to all third parties, including CAPs, IXCs, and end users. This Order in conjunction with today's other companion access Orders will expand service choices for telecommunications users, heighten incentives for efficiency, and increase pressure for cost-based prices.

A major aspect of this Order is the recognition and authorization for additional pricing flexibility to enable the LECs to price their own services in response to competition. I believe that the interconnection rules established in this item in conjunction with the added pricing flexibilities for the LECs, represents an equitable regulatory framework for increased competition in the interstate special access market.

This item requires LECs to make physical collocation available to all interconnectors that request it. The parties would be free to negotiate satisfactory virtual collocation arrangements if such arrangements are preferable from the point of view of both parties. Although interconnectors will have a right to physical collocation, this approach allows interested parties to negotiate collocation arrangements to meet specific needs. It is quite likely that LECs will be able to create virtual collocation arrangements sufficiently comparable to physical collocation that many interconnectors will choose virtual rather than physical collocation.

The tariffs implementing expanded interconnection for special access will include connection charges designed to compensate the LECs for services offered to interconnectors. However, the LECs will not be allowed to impose a contribution charge at this time.

*U.S. Government Printing Office: 1992 — 342-145/80005